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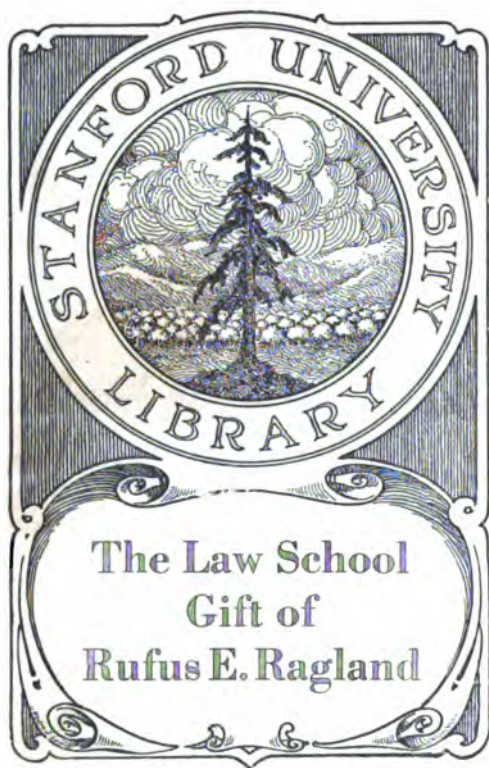
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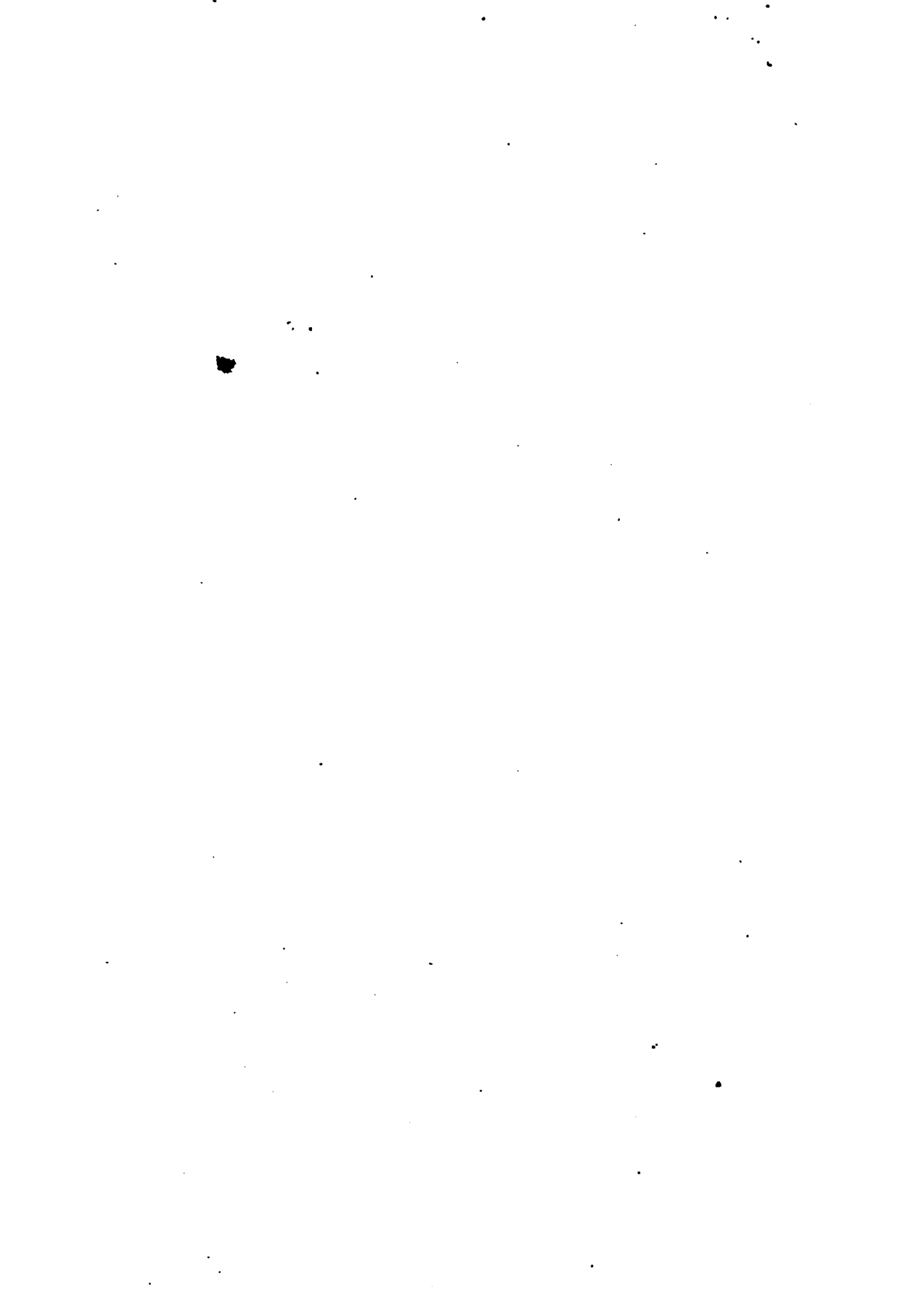
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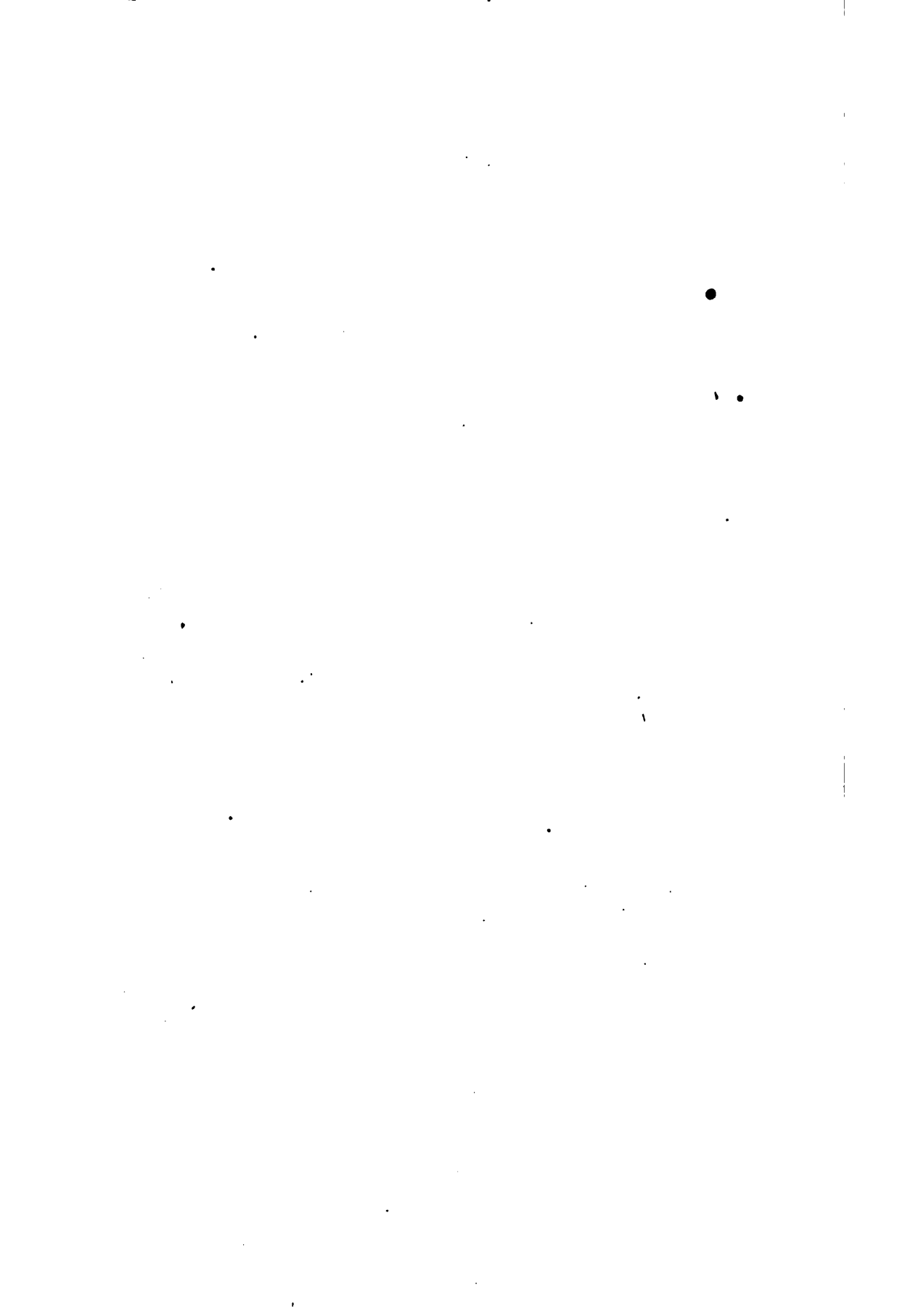
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
English Courts of Chancery,
WITH
NOTES AND REFERENCES
TO ENGLISH AND AMERICAN DECISIONS,

~~~~~  
By THOS. W. WATERMAN,  
COUNSELLOR AT LAW.  
~~~~~

VOL XII.
CONTAINING 1 TURNER & RUSSELL, AND 1 TAMLYN.

NEW YORK:
BANKS, GOULD & CO., 144 NASSAU STREET.
ALBANY:
GOULD, BANKS & CO., 475 BROADWAY

1854.

Entered according to the Act of Congress in the year one thousand eight hundred
and fifty-four, by
BANKS, GOULD & CO.,
in the Clerk's Office, in the District Court of the United States for the Southern
District of New York.

BANKS, GOULD & Co., Law Printers, 144 Nassau Street.

JOHN McNICOL, Stereotyper, 11 Spruce Street.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

HIGH COURT OF CHANCERY,

DURING THE TIME OF

LORD CHANCELLOR ELDON.

~~~~~  
By GEORGE TURNER, AND JAMES RUSSELL, Esqs.,  
BARRISTERS AT LAW.  
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VOL. I.

1822, 1823, 1824.—3, 4, & 5 GEO. IV.

NEW YORK:
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1854.

EARL OF ELDON, - - - - *Lord Chancellor.*

SIR THOMAS PLUMER, - - *Master of the Rolls.*

SIR JOHN LEACH, - - - - - *Vice-Chancellor.*

SIR ROBERT GIFFORD, $\left. \begin{array}{l} \\ \end{array} \right\}$ - - - *Attorneys-General.*
SIR J. S. COPLEY,

SIR J. S. COPLEY, $\left. \begin{array}{l} \\ \end{array} \right\}$ - - *Solicitors-General.*
SIR CHARLES WETHERELL,

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REPORTS OF CASES.
 ARGUED AND DETERMINED
 IN THE
 HIGH COURT OF CHANCERY,
 COMMENCING IN THE
 SITTINGS BEFORE MICHAELMAS TERM,

3 GEO. IV., 1822.

*TWEDDELL v. TWEDDELL.

[*1]

1822: 11th May; 2d, 12th and 14th November.

A father, tenant for life, remainder to his first and other sons successively in tail male; the eldest son, soon after he attained twenty-one, joined his father in suffering a recovery, an annuity was secured to him during his father's life, and parts of the estates were limited to the father in fee, the residue of them were resettled, the son taking back an estate for life, with remainder to his first and other sons in tail general, remainder to his daughters in tail general. The transaction to be considered as a mixed case of bargain and sale, and of family arrangement; and the eldest son having died without issue, a bill filed by his brother, the next remainder-man in tail, who had done confirmatory acts, and accepted interests under the will of his father, to set aside the settlement as obtained by undue influence, was dismissed.

Transactions of this nature between father and child, to be viewed with a reasonable degree of jealousy, not in the light of reversionary bargains.

Whether, after the lapse of twenty years, such a suit could be maintained at all.—*Quære.*

Whether a remote remainder-man can complain of a transaction between the tenant for life and the immediate remainder-man, where the immediate remainder-man makes no complaint.—*Quære.*

JOHN AYNLEY, being seised in fee of freehold estates
 in the counties of Northumberland and Durham, *by his [*2]
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1822.—Tweddell v. Tweddell.

will, dated the 15th of January, 1748, devised the same, together with certain copyhold hereditaments, which he had duly surrendered to the uses of his will, to the use of Francis Tweddell for life, with limitation to trustees during his life to preserve contingent remainders, with remainder to the first and other sons of the said Francis Tweddell successively in tail male, with remainders over.

Upon the death of the testator, in 1752, Francis Tweddell entered into the possession of the devised estates. He had issue three sons; John Tweddell, his eldest son, Francis Tweddell the plaintiff, his second son, and Robert Tweddell one of the defendants, his youngest son. He had also issue two daughters.

In the years 1776 and 1784, two Acts of Parliament were passed for enclosing the common fields in certain parishes, in which some of the devised estates were situate; and allotments were made to Francis Tweddell the father, in respect of those estates. His proportion of the expenses of passing and carrying these Acts into execution amounted to the sums of 518*l.* 10*s.* and 180*l.*, and those sums were paid by him.

By an indenture, dated the first of January, 1783, Francis Tweddell the father, by virtue of a power contained in the first mentioned Act, demised the lands allotted to him under that Act to Robert Ilderton, for the term of one thousand years, by way of mortgage for securing the sum of 869*l.*, being that part of the sum of 518*l.* 10*s.* which he was enabled to charge upon the allotments; and, by an indenture bearing even date with the mortgage, Ilderton declared that his name was made use of as a trustee for Francis Tweddell the father.

In the month of June, 1791, John Tweddell attained [*3] the *age of 21 years; and in the latter end of the year 1792, he agreed to join with his father in suffering recoveries of all the devised estates, and in limiting them to the uses after mentioned. Indentures of lease and release, dated the 4th

1822.—Tweddell v. Tweddell.

and 5th of January, 1798, were accordingly prepared and executed; the release recited the facts before stated, that application was intended to be made to Parliament, for an Act to effect the enclosure of other commons, and that Francis Tweddell the father, had expended divers sums of money, to a very considerable amount, and more than a tenant for life could reasonably have been expected to do, in erecting hedges and fences upon, and in making other lasting improvements of the devised estates; and then, in performance of the said agreement, and in consideration of the said sum of 369*l.* (part of the aforesaid sum of 518*l.* 10*s.*), then due to the said Francis Tweddell the father, by virtue of the said mortgage to the said Robert Iderton, and of the sum of 149*l.* 10*s.*, being the residue of the said sum of 518*l.* 10*s.*, and of the said sum of 180*l.*, and of the several other sums of money expended by the said Francis Tweddell the father, as thereinbefore recited; and also, in consideration of the covenants thereafter contained, on the part of the said Francis Tweddell the father, and of a bond entered into by him, for the payment to the said John Tweddell, during the life of him the said Francis Tweddell, of an annuity of 180*l.*, and of a further annuity of 20*l.* in the event in the said bond expressed; they the said Francis and John Tweddell, conveyed all the aforesaid freehold estates in the said county of Northumberland, to a tenant to the precipe for suffering a recovery; which recovery, it was declared, should inure, as to the principal part of the same estates, to the use of the said Francis Tweddell the father for life, without impeachment of waste, remainder (subject to an annuity of 100*l.*, thereby limited to Jane, the wife of the said Francis Tweddell the father, during her widowhood, in case she should survive her husband) to the use of the said John Tweddell *for life, [*4] without impeachment of waste, remainder to the use of his first and other sons successively in tail general, remainder to the use of his daughters, as tenants in common in tail general, with cross-remainders between them in tail, remainder, as to one moiety of the said premises to such uses generally as the said Francis Tweddell the father, should by deed or will appoint; and in default of such appointment, to the uses therein mentioned;

1822.—Tweddell v. Tweddell.

and as to the other moiety of the said premises, to the use of the defendant Robert Tweddell for life, without impeachment of waste, remainder to the use of his first and other sons successively in tail general, remainder to the use of his daughters, as tenants in common in tail general, with cross-remainders between them in tail, remainder after and subject to a general power of appointment, limited to Francis Tweddell the father, to the use of the plaintiff Francis Tweddell for life, without impeachment of waste, with the like limitations in favor of his sons and daughters in tail, with the ultimate remainder to the use of the said Francis Tweddell the father, in fee; and as to all other the estates in the said county of Northumberland, to the use of Francis Tweddell the father, in fee. By the indenture of release John Tweddell was empowered, when he should be in actual possession of the premises limited to him for life, to charge the same with an annuity, not exceeding 200*l.*, by way of jointure, for the life of any woman he might marry; and with any sum, not exceeding 2,000*l.*, for the portions of daughters and younger sons; and Francis Tweddell the father covenanted to complete, at his own expense, the enclosure then in progress under the second mentioned Act of Parliament, and to defray the expenses of obtaining and carrying into execution the Act of enclosure then intended to be applied for, provided such expenses should not exceed the amount which a tenant for life should be empowered under the Act to charge upon the lands allotted to him; the term of 1,000 years, granted to Ilderton, was surrendered and merged.

[*5] *In Easter Term, 1793, a recovery was suffered of the Northumberland estates; and deeds having been executed by Francis Tweddell the father, and John Tweddell, for the purpose of making a tenant to the precipe of the Durham estate, recoveries were suffered thereof, and of the copyhold premises, and they were respectively limited to the use of Francis Tweddell the father, in fee. On the 25th of July, 1799, John Tweddell died without issue; and in the year 1800, Francis Tweddell the plaintiff, joined with his father in suffering a recovery of a

1822.—Tweddell v. Tweddell.

portion of the Northumberland estate, which had been intended to be comprized in the recovery of 1793, but which had been omitted by mistake, and in limiting the same to his father in fee.

Francis Tweddell the father, having sold the freehold estate at Durham, and part of the other freehold and copyhold estates limited to him in fee, by his will dated the 14th of March, 1805, exercised the power first reserved to him by the release of January, 1793, and limited the moiety subject to the power, of parts of the estates, to trustees for a term for securing certain annuities, remainder to the defendant Robert Tweddell for life, remainder to his first and other sons successively in tail general, remainder to his daughters, as tenants in common in tail general, remainder to the plaintiff Francis Tweddell for life, remainder to his first and other sons successively in tail general, remainder to his daughters as tenants in common in tail general, with remainder to his own right heirs; and he limited the moiety of the residue of the said estates, to trustees for a term for securing annuities, remainder to the plaintiff Francis Tweddell for life, remainder to his first and other sons successively in tail general, remainder to his daughters as tenants in common in tail general, remainder to the defendant Robert Tweddell, and his issue, with remainder to his own right heirs. The testator then devised certain parts of the estates limited to him in fee by the release of January, 1793, in moieties between his two sons, the *plaintiff and defendant, and their issue; and the residue [*6] of such estates he devised to trustees, upon trust to sell, and to stand possessed of the money produced by the sale upon trusts for the benefit of his daughters. The testator appointed the defendant Robert Tweddell and Simon Mewburn, executors of his will, and died on the 14th of October, 1805.

The bill was filed on the 13th of February, 1813, by Francis Tweddell the son, against Robert Tweddell, and the executors and trustees under the will of Francis Tweddell the father, and was amended by virtue of an order dated the 5th of May, 1815. The amended bill, in addition to the facts before mentioned,

1822.—Tweddell v. Tweddell.

alleged, that undue advantage had been taken of the youth and dependent situation of John Tweddell; that the benefits obtained by Francis Tweddell the father were unreasonable and unjust, and represented the plaintiff's embarrassments as the reason of his having joined in the recovery suffered by him after the death of his elder brother. It then prayed that the recovery deeds and the recoveries before mentioned might be declared to have been obtained by undue influence, and that the limitations, contained in the release of January, 1798, which were then undetermined, might be set aside, and the plaintiff be declared entitled in equity to the fee simple and inheritance of such of the estates devised by the will of the said John Aynaley, as were then remaining unsold, and that the defendant Robert Tweddell, and the other defendants the trustees, might be decreed to convey the respective estates and interests vested in them by the recovery deeds, and by the will of Francis Tweddell the father, to the plaintiff in fee; that an account might be taken of the sums of money produced by the sale of the estates limited to Francis Tweddell the father, in fee, and which had been sold by him and his devisees in trust; and that the executors of Francis Tweddell the father, might be decreed to pay to the plaintiff [*7] tiff, what, upon taking such *account, should be found to have arisen from the aforesaid sales (except the produce of the sale of the estates, devised by the will of Francis Tweddell the father, in trust for sale, the bequest of which in favor of his sisters the plaintiff offered to confirm), and in case the executors should not admit assets sufficient to answer what might be found due to the plaintiff, that the usual accounts might be taken of the personal estate of the said Francis Tweddell the father.

The defendant Robert Tweddell, by his answer, admitted that at the time when the recovery was proposed to be suffered, John Tweddell had no other means of subsistence, beyond what was allowed him by his father, except a fellowship at Trinity College, in the University of Cambridge, which did not then produce so much as 80*l.* a year, and that the recovery deeds were prepared

1822.—Tweddell v. Tweddell.

by the directions of Francis Tweddell the father, and that the same solicitor was employed in the transaction on behalf of John Tweddell, and of Francis Tweddell the father. The defendant also admitted that part of the freehold and copyhold premises, limited to Francis Tweddell the father, in fee, not including the freehold estate at Durham, were sold by him for the sum of 4,233*l.*, and that other parts of the aforesaid premises were sold by his devisees in trust for 1,350*l.*, and that the remainder of the aforesaid premises were of the value of 700*l.*, or thereabouts. The defendant also stated that the moiety of the premises, which upon the death of John Tweddell without issue, became subject to the power of appointment of Francis Tweddell the father, did not exceed in value 15,000*l.* The defendant denied that any undue advantage had been taken of John Tweddell, or that the terms entered into were unreasonable, or that John Tweddell was ignorant of the value of the property proposed to be limited to Francis Tweddell the father, and stated that John Tweddell lived upwards of six years after suffering the recovery, and never expressed himself dissatisfied therewith, or with the settlement made thereupon, and that the plaintiff *had himself [*8] acquiesced in the settlement until the beginning of the year 1813. The defendant admitted the plaintiff's embarrassments, but submitted that by suffering the recovery of the premises omitted by mistake in the deeds of 1793, he had confirmed the recovery suffered by his brother. The answer then set forth a clause in the will of the testator Francis Tweddell, by which, after reciting that his son Francis Tweddell the plaintiff, was indebted to him on bond, note and otherwise, the said testator released and discharged his said son from the payment of all such sum and sums of money, and directed that all the securities given by him for the money due, should immediately after his decease be delivered up to be cancelled.

James Losh, who was stated in the answer to have been consulted by John Tweddell, on the subject of the fairness of the recovery, deposed, that he did not believe that John Tweddell had executed the deeds in question without consideration or re-

1822.—Tweddell v. Tweddell.

flection, inasmuch as he had previously mentioned to the deponent his determination to propose an arrangement for the settlement of the family property, and his wish to have some permanent allowance out of the same; that John Tweddell was at the time of the transactions aforesaid, as the deponent had reason to believe, well acquainted with the nature and value of the property proposed to be barred and settled; and that after he had executed the deeds, and perfected the arrangement, he had frequently expressed himself to the deponent to be perfectly satisfied therewith, and perfectly to approve thereof.

The solicitor, who was concerned in the transaction for both parties, deposed; that he had at different times before the recovery was suffered, and the deeds were executed, conversed with John Tweddell upon the arrangement made by him with his father; and that upon such occasions he appeared to be satisfied therewith, and perfectly to understand the same; and [*9] particularly, that he had expressed *himself glad to have it in his power, by executing the deeds, and joining in suffering the recovery, to reimburse his father for the advances which he had made in order to improve the estates, and to enable him to provide for his, the said John Tweddell's, brothers and sisters.

On the cross-examination of these witnesses by the plaintiff, it appeared that they were unacquainted with the property comprized in the deeds and recoveries, and incompetent to form any opinion of the value of the interests purchased by Francis and John Tweddell of each other, and had not taken upon themselves to explain to John Tweddell, or advise him upon the value of such interests. The solicitor also deposed to his belief, that no other person was employed on the behalf of John Tweddell, to explain or advise him upon the fairness of the bargain. Evidence was also entered into by the plaintiff, to show that John Tweddell was indebted at the date of the transaction.

The cause having been heard before the Vice-Chancellor, on the 10th of July, 1818, his Honor ordered the bill to be dismissed.

1822.—Tweddell v. Tweddell.

The plaintiff appealed from the decree of the Vice-Chancellor, and the cause now came on to be argued.

Mr. *Hart*, Mr. *Heald* and Mr. *Treslove*, for the plaintiff: It is the established principle of the court, that in dealings between attorney and client, guardian and ward, and in the cases of reversionary interests, the purchaser is bound to show that he has given the full consideration, *Gibson v. Jeyes*,^(a) *Gowland v. De Faria*,^(b) and in transactions of this nature between father and child, the natural influence of the father has always induced the court to *interfere and examine the consideration on which the bargain is founded. Everything is not in such cases to be presumed in favor of the affection between father and child; *Gould v. Okeden*,^(c) *Morgan v. Morgan*,^(d) *Heron v. Heron*,^(e) *Kinchant v. Kinchant*.^(g) The plaintiff is either entitled to the estate in fee simple, as the heir at law of John Tweddell, or to call upon the court to convey to him in tail, on the ground that the settlement has been disturbed. The cases of *Colby v. Smith*,^(h) and *Englefield v. Englefield*,⁽ⁱ⁾ show, that although the plaintiff claims as remainder-man, the court can afford him relief. There are, besides, many cases in which the court has recognized the interests of a remote remainder, with reference to the proceedings of the owners of the particular estate. *Robinson v. Lytton*,^(k) *Lord Dursley v. Fitzhardinge*.^(l) The pressure under which the plaintiff labored, when he joined in the recovery of 1800, will prevent it from operating as a confirmation, *Crowe v. Ballard*,^(m) *Wood v. Downes*.⁽ⁿ⁾

Mr. *Horne* and Mr. *Duckworth*, for the defendant: The settlement of 1793 has a reference to pecuniary matters only in the

(a) 6 Ves. 266.

(b) 17 Ib. 20.

(c) 4 B. P. C. Ed. Toml. 198.

(d) 1 Atk. 489.

(e) 2 Atk. 160.

(g) 1 B. C. C. 369.

(h) 1 Vernon, 205.

(i) 1 Vern. 443.

(k) 3 Atk. 209.

(l) 6 Ves. 251.

(m) 1 Ves. Jun. 215; 3 B. C. C. 117;
2 Cox. Chan. Cas. 253.

(n) 18 Ves. 120.

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usual mode of family arrangements, and is not to be viewed in the light of a bargain and sale. Under the original settlement of the estates, no provision could be made for daughters, or younger children; the son therefore might naturally wish to enable the father to raise money for these purposes, and in *Kinchant v. Kinchant*, the advantage derived to brothers and sisters from the transaction was considered as a material circumstance; in this *case there is no evidence of undue influence, and, on the ground of inadequacy of consideration alone, the court will not interfere, unless it is so gross as to raise a presumption of fraud. Any complaint of such a transaction as this must be made at the earliest period, *Brown v. Carter*,^(a) but the plaintiff's interest as tenant in tail in remainder commenced in 1799, he has confirmed the transaction by suffering the recovery in 1800, and has acquiesced in and taken interests under the will of his father, inconsistent with the validity of the settlement. In consequence of that acquiescence, his father's executors have not pressed him for the payment of debts, from the recovery of which they are now barred by the Statute of Limitations.

Mr. Hart in reply: Where the court sustains a bargain on the ground that it is a family transaction, it must see clearly that the parties acted upon that principle. But the deed shows, that in this case family advantages did not enter into the consideration of the parties. Lapse of time is only regarded by the court where the parties have dealt with their interests, so that the plaintiff cannot restore them to the same situation, or where evidence may be considered to be lost, objections which do not apply in the present instance. In *Newman v. Rogers* the late Master of the Rolls overturned a transaction similar to the present on the simple ground of inadequacy of value, although there had been a long acquiescence.

THE LORD CHANCELLOR:—When this case was first opened, it appeared to me that there were some very important points in

(a) 5 Ves. 877.

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it, the first of which was, whether, the complaint not having been made within twenty years, on the principle of a late decision in *the House of Lords the cause could be [*12] heard at all. I should have thought that a very material and important point, both for argument and for the decision of the court, if the case had admitted of it, but without deciding that after twenty years, Francis Tweddell the plaintiff could not have sued, it is sufficient for me to say, that the bill must be taken to have been filed in February, 1813, and therefore within the twenty years, and that consequently the point in question does not arise.

Another equally material and important question is, whether the plaintiff can come into court at all or not, under the circumstances of the case. The Lord Chancellor here stated the case; and observed, that under the original settlement, the father being only tenant for life, could make no provision for any of his children; and that John, being only tenant in tail male, could in his father's lifetime make no provision for daughters, if he should have any; but that John and his father might unquestionably, without any consideration, have barred both the brothers; and that the effect of the recovery which had been suffered was, to introduce Robert as a remainder-man into the succession, before Francis could become entitled. He then proceeded.

The first question therefore to be considered is, what Francis could have done in the lifetime of John; and I wish to be informed whether there is any case, in which a remote remainder-man has come into court, complaining of what he is pleased to call a deception on the immediate remainder-man, where that immediate remainder-man himself made no complaint. I recollect no such instance. If Francis had made the complaint in the lifetime of John, John might have replied, I choose to prefer Robert to you, and to acquire such an estate as will enable me to provide for daughters. It seems therefore to me to be infinitely difficult to suppose, that a remote remainder-man could complain to the court of a transaction, of which the party himself, the

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[*13] *remainder-man immediately interested, did not complain; and the new limitations are of such a nature, that John Tweddell, the immediate remainder-man, must have known, that by that transaction he was altering the succession and order of the estate, both as to his brothers, and as it might affect his daughters, if he should have any. The point however being new, and no decision having yet been made on it, I shall not pronounce judgment to that effect; and I wish it to be understood, that I do not decide, that after twenty years this gentleman could not complain at all, or that he could not come to complain of this transaction, although it was not complained of by the immediate remainder-man.

The court will not view transactions between father and son in the light of reversionary bargains, but will regard them, as family arrangements, with a reasonable degree of jealousy; and will not look into all the motives and feelings which might actuate the parties in entering into such arrangements. There may be consideration in such cases, which the court could not possibly reach. It might be conducive for instance to the best interests of the parties, that the father should be enabled to educate all his children in a liberal way; a principle on which the court acts in the case of an infant eldest son, by giving for his maintenance a much greater sum than he can possibly require, in order that his brothers and sisters may be so brought up and educated, and placed in such situations, as to do him credit in the world.

John Tweddell died in 1799; and taking it that upon his death a title did arise to the plaintiff, so far from prosecuting that title, he does confirmatory acts with respect to the new settlement, and such confirmatory acts as to show that he must have understood what the new settlement was. In 1805, the father of the plaintiff dies, having made his will with reference [*14] to this settlement: by that *will the plaintiff takes both positively and negatively, for I observe that the father forgave him debts. It is reasonable to suppose that the plaintiff,

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if he had considered that he had any cause for complaint, would at the death of his father have so complained: but he waits till the Statute of Limitations has run upon the simple contract debts, and barred the father's executors of their remedy against him. Under these circumstances, I do not see how it is possible to maintain this suit. I cannot look at this transaction upon the mere principle of bargain and sale: but I consider it as a mixed case of bargain and sale, and of family arrangement. I will read the judgment in *Newman v. Rogers*, and if I change my opinion will mention it to-morrow.

November 14th.—The case of *Newman v. Rogers*, makes no alteration in my former opinion, and therefore the appeal must be dismissed.

NEWMAN v. ROGERS.

FRANCIS NEWMAN, being seised in fee simple of the rectory of Queen Camel, of several estates called the North Leaze Park, the Sparkford, and the South Cadbury estates, and of other freehold and copyhold estates, by his will dated the 30th of May, 1767, devised the same to his nephew Francis Newman for life, with remainder to the first and other sons of the said Francis Newman in tail male, with remainder to his nephew Henry Newman, for life, with remainder to his first and other sons in tail male, with divers remainders over, and with a power to the tenants for life, when in possession, to settle any part of the estates not exceeding in value 200*l.* a year, upon any woman they might marry, for her life.

The testator died in 1768, leaving the said Francis Newman and Henry Newman, the devisees, him surviving. The said Francis Newman had three daughters, but no issue male; and the said Henry Newman had issue a son, Francis Newman the younger, who was the first tenant in tail male of the devised estates.

*In the year 1778, the said Francis Newman the younger, intermarried [*16] with one of the daughters of the said Francis Newman the elder; and in the month of May, 1780, having just attained twenty-one, he concurred with the said Francis Newman the elder, in suffering a recovery of the devised estates, and in resettling them, to the use of the said Francis Newman the elder for life, with remainder to his first and other sons in tail male, with remainder to the said Henry Newman for life, with remainder to Francis Newman the younger in fee.

Shortly after the death of the testator, and in pursuance of the power given by his will, the rectory of Queen Camel (which appeared to be of the yearly value of 200*l.*) was limited to Jane, the wife of the said Francis Newman the elder, for

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her life; and by indentures of lease and release, dated the 14th and 15th of February, 1783, the said Francis Newman the younger, in consideration of the settlement after mentioned, conveyed his remainder in fee in the said rectory, and in North Leaze Park estate (which was of the yearly value of 120*l.*), to Henry Simpson and Simon Payne and their heirs; to the use of the said Francis Newman the elder for life, with remainder to the use of the said Jane his wife for life; with remainder to the use of such of the daughters of the said Francis and Jane as the said Francis should by deed or will appoint, and in default of appointment, to the uses mentioned in the release. By other indentures, of the same date, the said Francis Newman the elder and Francis Newman the younger, conveyed the Sparkford and South Cadbury estates (which appeared to be of the yearly value of 520*l.*) to Thomas Watson and the said Simon Payne, and their heirs (subject to the remainders to the first and other sons of the said Francis Newman the elder, and to the remainder to the said Henry Newman, during his life); upon trust, during the joint lives of the said Francis Newman the younger, and Frances his wife, to pay an annuity of 100*l.* out of the rents and profits to the said Frances, for her separate use; and to permit the said Francis Newman the younger, to receive the surplus of such rents for his life; and after the decease of both, upon trust for such child or children of the said Francis Newman the younger, and Frances his wife, as they should by deed appoint; and in default of such appointment, in trust for their daughters, as tenants in common in fee, and if only one daughter, in trust for her in fee; and in default of such issue female, in trust for their younger sons, as tenants in common in fee, and in default of such issue, in trust for the eldest son in fee; and in default of all such issue, in trust for the right heirs of the said Francis Newman the younger.

[*16] *It was admitted, that at the period when the last mentioned deeds were executed, Francis Newman the younger, was in distressed circumstances, and that Francis Newman the elder, was then of the age of sixty-five years, and Jane Newman his wife, of the age of fifty-four years.

The original bill which was filed by Francis Newman the younger, against the said Simon Payne and Francis Newman the elder, alleged, that upon the marriage of the plaintiff, the said Francis Newman the elder, had agreed to surrender to the plaintiff his life interest in the Sparkford and South Cadbury estates, as the marriage portion of his daughter; and that it had been agreed that in the deeds for suffering the recovery, a power should be given to the plaintiff and to the defendant Francis Newman the elder, jointly to grant leases and copies of court roll of the devised estates, for their joint benefit, but that by fraud and imposition practiced by the defendant Francis Newman the elder, the Sparkford and South Cadbury estates had not been conveyed in any other manner than by the indentures of the 14th and 15th of February, 1783; and the power of granting leases and copies of court roll had been reserved to the defendant Francis Newman the elder, separately for his own benefit. The bill also alleged that the plaintiff had been fraudulently induced to execute the several indentures of lease and release of the 14th and 15th of February, 1783; and prayed that the said Francis New-

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man the elder, might be decreed to account for the rents and profits of the Sparkford and South Cadbury estates, from the time of the plaintiff's marriage, until the possession was delivered to the plaintiff, and to pay what upon taking such accounts should be found to be due; that the power obtained by the defendant, for granting leases and copies of court roll of the devised estates, might be set aside for fraud and imposition; and that the defendant might be decreed to deliver up, or procure to be delivered up to be cancelled, all the leases and copies of court roll which had been granted by him under the power; or that a moiety of the fines received by the defendant by virtue of such leases or copies, and a moiety of the rents thereafter to be received therefrom, might be paid to the plaintiff; and that the indentures of lease and release of the plaintiff's two several reversions obtained by the defendant from the plaintiff might be set aside; and that the defendant might be decreed to join in reconveying the same to the plaintiff; or in case the defendant had conveyed the North Leaze Park estate to a purchaser for valuable consideration without notice, that the defendant might make satisfaction to the plaintiff for the full value thereof.

*Francis Newman the elder died in 1796; and upon his death a supplemental bill was filed against his executors, and against Catharine Rogers, one of his daughters, who claimed to be entitled to the remainder in fee in the rectory of Queen Camel, as appointee under the power reserved to Francis Newman the elder, by the first mentioned indenture of release of the 15th of February, 1783. [*17]

The defendant Francis Newman the elder pleaded the Statute of Frauds in bar of the discovery and relief prayed by the bill, so far as it related to the agreement alleged to have been made upon the marriage of the plaintiff; and in answer to the other parts of the bill, the defendant denied that he had ever agreed with the plaintiff that the powers mentioned in the bill should be reserved to the plaintiff and the defendant for their joint benefit, or made any such agreement; or that he had practised any fraud or imposition upon the plaintiff. And he stated that the consideration which he paid for the conveyance of the reversions by the plaintiff, was the release of the Sparkford and South Cadbury estates, which he believed to be a fair consideration. The answer also stated that the North Leaze Park estate had been settled upon the marriage of Jane, one of the daughters of the defendant.

The cause was heard on the 27th, 28th, and 29th of June, 1809, and was ordered to stand for judgment on the 1st of August, 1811.

The decree directs that the plaintiff's bill, so far as it seeks to charge the late defendant Francis Newman the elder, with fraud and imposition in obtaining the power of granting leases and copies of court roll of the devised estates, and to have such power set aside, and so far as it seeks to have an account of the rents and profits of the Sparkford and South Cadbury estates from the time of the marriage of the plaintiff, shall stand dismissed without costs. It then declares that the plaintiff is entitled to have the rectory of Queen Camel reconveyed to him, and to have the rents and profits thereof, accrued since the death of the late defendant Francis New-

 1822.—Roper v. Williams.

man, accounted for and paid to him; and to be paid out of the assets of the said late defendant, the value of the estate called North Leaze Park, and the amount of the rents and profits thereof accrued since the death of the said late defendant. It then directs accounts to be taken of the rents and profits of the Sparkford and South Cadbury estates, received by the plaintiff in the lifetime of the said late defendant, and of the rents and profits of the rectory of Queen Camel received since [*18] the death of the said late defendant by the defendants his executors; and after further directing the value of the North Leaze Park estate, and the amount of the rents and profits thereof which would have accrued since the death of the said late defendant to be ascertained, and ordering that what shall be coming in on account of the rents and profits of the Sparkford and South Cadbury estates be deducted from the value of the North Leaze Park estate and the rents and profits thereof, it proceeds to direct, that what shall remain due to the plaintiff after such deduction, and the plaintiff's costs of so much of the suit as relates to the rectory of Queen Camel and the North Leaze Park estate, be answered by the defendants the executors, out of their assets of the said Francis Newman the elder, and that all proper parties reconvey the rectory of Queen Camel to the plaintiff and his heirs.

Reg. Lib. B. 2. 1810, fol. 1471.

ROPER v. WILLIAMS.

1822: 3d, 5th and 21st November.

Injunction to restrain the breach of a covenant, that buildings shall be erected upon a general plan refused, the covenantee having acquiesced in a partial deviation from the plan, and not having made immediate application to the court.

A landlord who relaxes in favor of some of his tenants a covenant entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing that covenant.

THE bill in this cause stated that by indentures of lease and release, dated the 26th and 27th of March, 1816, the defendant Williams, for a valuable consideration in money, conveyed to the plaintiff, his heirs and assigns, a piece of ground, adjoining on the south upon an intended road, and on the north, east and west upon other lands belonging to the defendant; and that by the said indenture of release, the said defendant covenanted that he, his heirs, appointees and assigns, would not at any time thereafter erect or suffer to be erected on the land belonging to him on the north side of the ground thereby conveyed, any buildings

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whatsoever, and that all messuages, tenements and buildings, to be erected by him, his heirs, appointees and assigns, or any person or persons claiming under him or them, on the land belonging to him adjoining on the east and west sides of the *said ground thereby conveyed, should be built in a line [*19] thirty feet from the said intended road, and that the same should be detached houses, and not less than of the third rate or class of building.

The bill then stated that the defendant Williams had entered into an agreement to sell, and was about to convey to John Piper Burnard, another of the defendants, part of the land belonging to him to the west of the plot conveyed to the plaintiff, without requiring any stipulation that Burnard should refrain from building houses in a manner not conformable to the before-mentioned covenant; and that the defendant Burnard had agreed to let the land, so agreed to be purchased by him, to the other defendant John Miller, for the purpose of building houses of an inferior description, and differently situate from those specified in the covenant; and that the defendant Miller had commenced building accordingly.

The bill prayed an injunction to restrain the defendants from erecting, or causing or permitting to be erected, on the ground which belonged to the defendant Williams at the time of the execution of the indentures of the 26th and 27th March, 1816, adjoining to the east and west sides of the ground conveyed to the plaintiff, and particularly on the ground stated to have been agreed to be sold to Burnard, any messuages, tenements or buildings, except in the manner mentioned in the aforesaid covenant of the defendant Williams.

The injunction was granted on the 23d of May, upon certificate of the bill filed, and an affidavit of the facts above stated. The defendants now moved to dissolve it upon affidavits, which stated that the covenant entered into by Williams with the plaintiff, was never intended to extend beyond the ground immedi-

1822.—*Roper v. Williams*.

ately adjoining, on the east and west sides of the land [*20] sold to the plaintiff; and that a strip *of ground lying between the plaintiff's land, and the land agreed to be sold to Burnard, and extending 121 feet to the west of the plaintiff's land, had been sold to a Mr. Tomlinson, who was restricted from building in any manner not conformable to the covenant. The affidavits also stated, that early in the year 1818, the plaintiff had served the defendant Burnard with notice not to proceed in the erection of some houses, the carcasses of which were then complete, and which were of a different class from those specified in the covenant, and at a different distance from the intended road; but that on being shown the opinion of counsel that the rights under the covenant could not be insisted upon, the plaintiff had taken no steps to enforce the notice, and had permitted the defendant to complete the buildings. The affidavits further stated that the houses in question in the cause had been commenced early in the year, and had been proceeded with until the injunction was granted. The construction of the covenant set up by the defendants was denied by the plaintiff, who filed counter-affidavits. The motion to dissolve the injunction had been made before the Vice-Chancellor and refused.

Mr. *Agar* and Mr. *Roupell* for the defendant Williams. Mr. *Shadwell* and Mr. *Temple* for the defendants Burnard and Miller; in support of the motion :

The court will grant injunctions of this nature only where the mischief is irremediable, not in a case like the present, where there is merely a diminution of value, and damages will be a sufficient compensation. *Attorney-General v. Nichol*.(a) The plaintiff has waived the benefit of the covenant, by allowing [*21] houses to be built in violation of it, and *he cannot now be permitted to complain. His application for the special interference of the court ought to have been made at the

(a) 16 Vez. 342.

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earliest period. He must be left to his remedy at law upon the covenant.

Mr. *Horne* and Mr. *Spence* for the plaintiff, relied upon the construction of the covenant, as intended to embrace all the houses to be built upon the land belonging to Williams, and insisted that the acquiescence of the plaintiff in not complaining of the erection of buildings, by which the covenant was infringed in a partial degree, could not preclude him from relief against the more gross violation which was now attempted.

THE LORD CHANCELLOR :—This deed was made by a gentleman, who seems to have possessed land to the north, east and west of the piece of land bought by Mr. Roper. No question arises as to the land to the north : but as to the land on the east and west, one question is, whether the word “adjoining” contained in the covenant, includes all the land adjoining to the east and west to the utmost extremity in each direction, or whether it includes only a small portion immediately adjoining. It has been contended on the part of the defendant Williams, that it includes only the parts immediately adjoining : but I do not see how they can put that construction upon it, because the covenant extends to all the messuages to be built on the east and west sides, and according to their construction it would be exhausted by a single messuage. In my view of the case it includes all the land to the east and west as far as the utmost extremity in both those directions.

This case is not within the range of cases between A. and B. : but it is a case in which persons claiming under A., have in equity acquired rights both against A. and B., which *could not well be treated of in a court of law. If the [*22] matter were *res integra*, I should say that Williams had bound himself in equity to make no new grant, without giving notice of this covenant to all subsequent grantees. The object which Williams had in view seems to have been, to have laid out the whole of the land upon a general plan, and to get as

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many grantees as he could to be subject to the same obligations as Roper; and the covenant entered into by Williams with Roper was for the benefit of all such grantees. Having long lived in Gower Street, I have often been in the habit of illustrating my view of such cases, by reference to the stipulations contained in the Duke of Bedford's leases. In the lease of every house on the east side of that street, is contained a covenant that there shall be no erection behind them exceeding a certain height. The landlord in such a case is stipulating not only for his own benefit, but for the benefit of all the tenants in that neighborhood. If, therefore, the landlord in some particular instances lets loose some of his tenants, he cannot come into equity to restrain others from infringing the covenant, to whom he has not given such a license. He may have a good case for damages at law; but if he thinks it right to take away the benefit of his general plan from some of his tenants, he cannot with any justice come into equity for an injunction against those tenants. It is not a question of mere acquiescence: but in every instance in which the grantor suffers grantees to deviate from a general plan intended for the benefit of all, he deprives others of the right which he had given them, to have the general plan enforced for the benefit of all. In such cases I have always understood this court will leave the parties to their remedy at law.

There is another view in which this case may be considered: every relaxation which the plaintiff has permitted in allowing houses to be built in violation of the covenant, amounts *pro tanto* to a dispensation of the obligation intended to be contracted by it. Very little in cases of this *nature is sufficient to show acquiescence; and courts of equity will not interfere unless the most active diligence has been exerted throughout the whole proceeding. It is not sufficient to have given notice of the covenant in 1818. In every case of this sort the party injured is bound to make immediate application to the court in the first instance; and cannot permit money to be expended by a person, even though he has notice of the covenant, and then apply for an injunction. Taking all the circumstances

1822.—*Carleton v. L'Estrange*.

together, the permission to build contrary to the covenant, and the laying by four or five months before filing the bill, this is not a case in which a court of equity ought to interfere by injunction; but the plaintiff must be left to his remedy at law.

Injunction dissolved.

CARLETON *v.* L'ESTRANGE.

1822: 27th November.

After plea pleaded, and replication filed, and before the plea set down, it is not a motion of course to withdraw the replication, and amend the bill.

An order for that purpose, obtained of course, discharged for irregularity, and the amended bill ordered to be taken off the file.

IN this case, a plea having been put in by the defendant, the plaintiff filed a replication, and afterwards, before the plea was set down to be argued, obtained an order upon motion of course to withdraw the replication, and amend the bill.

It was now moved on the part of the defendant, that the order obtained by the plaintiff might be discharged with costs for irregularity, and that the amended bill might be taken off the file.

Mr. *Horne* and Mr. *Roupell* for the motion.

Mr. *Cooper* against it.

*THE LORD CHANCELLOR:—It is a very usual thing [*24] when an answer is put in, for a plaintiff to withdraw his replication and amend his bill, in some cases without notice of motion, and in other cases with notice. The question here is, whether after plea pleaded and replication filed, and before the plea is set down to be argued, you can move to withdraw the replication and amend the bill, as a motion of course, or whether

1822.—Beard v. Westcott.

you must not give a notice of motion. I have made inquiries upon the subject, and I cannot find a single instance where this has been done upon a motion of course, after plea pleaded and replication filed; and I do not see how it can be done, because something must be done about the plea. In the case of an answer, if you withdraw the replication and amend the bill, the answer still stands, as a species of answer at least, to so much of the original bill as remains: but with respect to the plea, which puts an end to the cause altogether, unless the court goes on to do something with it, there will be an amended bill with a plea remaining on record, not as part of an answer (there being no order that it should stand as an answer with liberty to except), but as a plea to the whole of the original bill. While the plea remains, the amendment cannot be made, without the court interposes to regulate the record in order that it may stand right. The motion must be granted, and I do not see any way of going to work except by taking the amended bill off the file: but I will give the other party an opportunity of speaking to that.

The motion was not mentioned again; and an order was made that the order obtained by the plaintiff should be discharged for irregularity, and that the amended bill should be taken off the file.

[*25]

*BEARD v. WESCOTT.

1822: 28th November.

Devise to A. for ninety-nine years, if he should so long live: remainder to his first son, then unborn, for ninety-nine years, if he should so long live; and so on in tail male to such first son lawfully issuing forever; and for want and in default of such issue of such first son, to the second and other sons successively for ninety-nine years only, in case he should so long live; and that such elder son or the issue of such elder son should have no greater estate than for ninety-nine years, determinable at his decease; and if there should be no issue male of A., at the time of his (A.'s) death, or in case there should be such issue male at that time, and they should all die before twenty-one without issue male, then to B. for ninety-nine years, if he should so long live; remainder to the first son of B. for ninety-nine years, if he should so long live, &c.: held, that A. took under the will

1822.—*Beard v. Westcott.*

an estate for ninety-nine years in the freehold estates, determinable with his life, and the same estate in the leasehold, if they should so long continue; and that, upon his death, his first son would take an estate for ninety-nine years in the freehold, determinable with his life, and the remainder of the term in the leaseholds: but that the limitations to the second and other unborn sons of A. were void as tending to perpetuity; and the limitations over to B., &c., after these void limitations were not accelerated, but were void also.

UPON the hearing of this cause a case was sent for the opinion of the Court of Common Pleas. The questions submitted to the consideration of that court, and the certificate of the judges, are reported in 5 Taunt. Rep. 392.

A case was afterwards sent for the opinion of the Court of King's Bench, which with the certificate of the judges of that court, is reported in 5 Barn. and Ald. 801.

The certificate of the two courts were conflicting.

The cause came on for further directions.

Mr. *Hart* and Mr. *Stephen* contended, that the Court of King's Bench had not returned a sufficient answer to the case; and that it could not be collected from their certificate, whether the circumstance that the limitations were to take effect at the end of a term of 21 years, without reference to the infancy of the person intended to take, created such a suspense of the vesting as to render the limitations void.

*Mr. *Sugden* for the plaintiff, insisted that the conclusion to which the Court of King's Bench had come, involved the decision of the point. [*26]

THE LORD CHANCELLOR:—It is impossible that the Court of King's Bench should not have considered that point. The certificate of that court appears to me to afford a substantial answer to the questions put; and, under the circumstances of this case, I think the best thing I can do is to confirm it, and thus to help

 1822.—*Nouaille v. Greenwood.*

the case to the House of Lords, if the parties think it right to take it there. The inclination of my opinion is that the Court of King's Bench is right.

Certificate confirmed.

NOUAILLE *v.* GREENWOOD.

1822: 25th and 28th November.

Equitable tenant in tail aliens in fee by way of mortgage; a good equitable recovery may be suffered of the secondary equitable estate without the concurrence of the mortgagee.

THE bill in this cause prayed the specific performance of a contract for the purchase by the defendant of an estate at Tonbridge. The master reported that a good title could not be made; exceptions were taken by the plaintiff to the master's report, and allowed by the Vice-Chancellor. From the order allowing the exceptions the defendant appealed.

The objection to the title arose from a recovery suffered by a person of the name of Isabella Cooke in the year 1746: [*27] *it was inferred from the recovery that an estate tail had previously existed, which it was alleged had not been effectually barred by the recovery, because the legal estate was in a mortgagee who had not joined in making the tenant to the præcipe.

The abstract stated a fine levied in Hilary Term, 1741, of an estate at Tonbridge by John Cooke and Isabella his wife; and the will of the said John Cooke dated the 24th of June, 1743, which contained a recital, "that his wife had passed a fine of all her estate at Tonbridge, and had settled the same in trustees, and had given them a power to raise the sum of 400*l.* and to make the said estate chargeable with the payment thereof;" and by which in case of his death before the said sum should be raised, he charged the said estate therewith.

1822.—*Nouaille v. Greenwood*.

The abstract further stated indentures of lease and release dated the 19th and 20th of May, 1746, whereby Isabella Cooke, her husband being then dead, conveyed the estate in question to the use of John Stow in fee, subject to redemption; and an indenture of bargain and sale dated the 18th of June, 1746, whereby, for barring all estates tail, she conveyed the premises to Joseph Curzon in fee, to make him tenant of the freehold for suffering a recovery, which it was declared should inure to the use of her, Cooke, in fee. A recovery was suffered accordingly in Trinity Term, 1746, in which she was vouched.

The abstract further stated indentures of lease and release dated the 7th and 8th of July, 1746, and make between Stow of the first part, Cooke of the second part, and Sidney Stafford Smyth, Esq. (afterwards one of the Barons of the Court of Exchequer), of the third part, by which Stow and Cooke conveyed the premises to Smyth as a security for the original mortgage money and a further sum *advanced by him. It [*28] then stated the will of Isabella Cooke, by which she devised to Edward Lloyd in fee; and an indenture dated the 21st of November, 1749, by which a further sum advanced by Smyth was secured upon the mortgaged premises.

From 1749 to the present time the estate had been held under the title of the mortgagors.

Mr. *Sugden* and Mr. *Barber*, for the defendant the purchaser, insisted that the presumption from the recovery was, that a legal estate tail existed, especially as the husband's will referred to a settlement; and that a reconveyance from the mortgagee could not be presumed, as he had conveyed subsequent to the recovery.

Mr. *Hart*, Mr. *Preston* and Mr. *Seton*, for the plaintiffs. There is no evidence of any estate tail; it is mere suspicion ending in suspicion, and cannot be the legitimate ground of legal decision.(a)

(a) Per Dallas, C. J., in *Gorton v. Sir T. Champneys*, C. P. 23d Nov. 1822.

 1822.—*Nouaille v. Greenwood*.

The settlement referred to in the will is no evidence of an estate tail. Nothing is more common than recoveries suffered without reason.

At this distance of time everything must be presumed to have been rightly done. The assignment of the mortgage to Sir S. S. Smyth, and the continued enjoyment ever since, exclude all doubt upon the question. *Sperling v. Trevor*, (a) *McQueen v. Farquhar*, (b) *Coussmaker v. Sewell*. (c)

[*29] *THE LORD CHANCELLOR:—The will of John Cooke in 1748, is evidence, that under some fine there was a settlement in trustees: but whether the legal estate was vested in them, or merely a power given to raise a charge on the estate, does not precisely appear. Although the expressions are inaccurate, the presumption seems to me to be that the legal estate was vested in the trustees.

The settlement is not noticed in the deed to lead the uses of the recovery: but although there is no doubt that many recoveries have been suffered unnecessarily, it is reasonable to suppose that this recovery was suffered with reference to the settlement. If then the legal estate was in the trustees, the mortgage in fee conveyed to Stow only an equitable estate, and then a good equitable recovery might be suffered of the secondary equitable estate without the concurrence of the mortgagee. (d)

At the time of the transfer of the mortgage to Sir S. S. Smyth, there is no evidence that he had all the antecedent instruments before him: but it is a strong thing to say that the title was not examined. We ought to give credit to men of eminence in the profession who were dealing for their own security, and therefore must conceive that the title was not accepted without examination.

(a) 7 Ves. 497.

(b) 11 Ves. 467.

(c) Sug. Vend. and Purch. App.

(d) This point is stated as a question open to decision in a note by Mr. Butler to p. 61 of the last edition of Fearn. See also *Casborne v. Scarfe*, 1 Atk. 603.

1822.—*Statham v. Hall*.

Besides this, there has been continued enjoyment under the title as contended for by the plaintiff; although I cannot say that ingenuity will not find objections to the title. There is no doubt that it is better than ninety-nine out of one hundred.

Appeal dismissed.

**STATHAM v. HALL*.

[*30]

ROLLS.—1822: 2d December.

Upon the hearing of an interpleading bill, evidence is admissible to show that the plaintiff has retained possession of the subject of the suit under an indemnity from some of the defendants.

BEFORE *Graham*, Baron, and Masters *Stephen* and *Courtenay*,
for the *Master of the Rolls*.

The bill in this cause prayed, that the defendants might be directed to interplead as to a bond which had been deposited with the plaintiff for safe custody. The usual affidavit was annexed to the bill.

On the part of some of the defendants, evidence was offered of the plaintiff's having retained the bond in question under an indemnity from the other defendants. It was objected by the plaintiff that the evidence was not admissible; and in support of the objection it was argued, that no evidence could be adduced on a bill of this description to affect the plaintiff, and that the question of indemnity was not in issue between the parties. On the other hand it was contended that the evidence offered entirely defeated the equity of the plaintiff's case, which depended upon the fact of his not being connected with either party, and that the affidavit formed part of the record.

Mr. Wingfield and *Mr. Evans*, for the plaintiffs.

Mr. Horne and *Mr. Koe*, for some of the defendants.

 1822.—*Bacon v. Proctor.*

Mr. *Lowndes*, for the other defendants.

Graham, Baron :—The question before the court is, whether this is a proper interpleading bill. The evidence offered tends to show that the plaintiff, instead of resting upon the [*31] indemnity of *the court, has taken a security by way of indemnity, and lent his name for the purpose of bringing forward the case in the shape of an interpleading suit. We are of opinion that evidence which tends so much to show the complexion of the bill must be admitted, and that it forms a material feature in the case.

The case was afterwards argued upon the merits, and the bill was dismissed with costs.

BACON v. PROCTOR AND OTHERS.

ROLLS.—1822: 4th and 6th December.

The plaintiff's father, upon the marriage of his daughters, demises an estate to trustees upon trusts for raising certain sums, which are settled upon the daughters and their children; and by his will, after charging the estate with other sums to be settled upon the same trusts, with portions for sons, and with a further sum in discharge of a mortgage of another estate, devises it to other trustees, upon trust from time to time to receive the rents and profits, and to invest the same in the purchase of stock, so as to accumulate and form a fund for the payment of the aforesaid charges; "and after the same should have been raised and paid, upon trust to pay the net rents, issues and profits unto or for the benefit of such person of his own name, blood and family, as for the time being should succeed to and be invested with his title and dignity of a baronet, to the end that his said estate might be continued in his name, blood and family, and be enjoyed and go along with his title, so long as the rules of law and equity would permit; but if upon failure of issue male of his body there should not be any person who should be entitled to enjoy his title, upon trust to stand seised of the estate, for the benefit of the person or persons who should be his right heir or heirs at law, and to convey and assure the same accordingly; held that the trust for accumulation was good, and that the plaintiff, the succeeding baronet, took a vested estate for life.

BEFORE *Graham*, Baron, and Masters *Simeon* and *Stratford*,
for the *Master of the Rolls*.

1822.—Bacon v. Proctor.

Sir Edmund Bacon, premier baronet of England, by his will dated the 19th of June, 1815, after reciting that he had *issue then living, five children, viz., Edmund Bacon, [*32] his eldest son, and Ann Frances Hussey, Nicholas Bacon, Maria Hodge, and Henry Bacon his younger children; and that by a settlement made previously to the marriage of his said daughter Ann Frances with Edward Thomas Hussey, Esq., he had granted and demised certain parts of his estate in Chancery Lane and its vicinity, to trustees for the term of 500 years, upon trust to raise the sum of 2,500*l.* within three months next after his decease, and to stand possessed thereof upon trusts for the benefit of the said Edward Thomas Hussey and Anne Frances his wife, and their issue; and that by a settlement made previously to the marriage of his said daughter Maria with Edward Hodge, Esq., he had granted and demised other parts of his said Chancery Lane estate to other trustees for the like term of 500 years, upon trust to raise another sum of 2,500*l.* within three months next after his decease, and to stand possessed thereof upon trusts for the benefit of the said Edward Hodge and Maria his wife and their issue; and after further reciting that he had advanced to his son the said Henry Bacon the sum of 3,000*l.*, 2,000*l.* of which he had borrowed upon mortgage of his estate at Thorpe in the county of Norfolk: subjected and charged his said Chancery Lane estate to and with the payment of the sum of 4,000*l.* with interest at the rate of five per cent. per annum, from the time of his decease, and directed that two sums of 500*l.* and 500*l.*, parts of such sum of 4,000*l.*, should be paid to the trustees of the marriage settlements of his said two daughters upon the trusts declared by such settlements respectively of the sums of 2,500*l.* and 2,500*l.* thereby directed to be raised; and that 3,000*l.*, the residue of the said sum of 4,000*l.*, should be paid to his son the said Nicholas Bacon. The testator then charged the said Chancery Lane estate with the further sum of 2,000*l.*; and directed the same to be raised by his trustees out of the rents and produce of that estate, and applied in discharge of the before-mentioned mortgage of 2,000*l.* and interest, *and to the trusts of the said several terms [*33]

1822.—*Bacon v. Proctor.*

of five hundred years and five hundred years respectively created by the marriage settlements of his said two daughters, the said testator gave and devised the said Chancery Lane estate unto and to the use of the trustees named in his will their heirs and assigns forever; upon trust from time to time to receive the rents and profits thereof; and after keeping the same in proper repair, and paying all necessary outgoings in respect thereof, to pay and keep down out of the net, rents and profits, the interest of the said two several sums of 2,500*l.* and 2,500*l.* respectively, directed to be raised under the trusts of the said several terms of five hundred years and five hundred years, and of the said sums of 4,000*l.* and 2,000*l.* so thereby charged as aforesaid, and subject thereto, upon trust to lay out and invest all the residue of such net rents and profits in the public stocks or funds in their names at interest, and from time to time to place out and invest in like manner all the dividends or annual proceeds which should arise or accrue from such stocks or funds, and from the stocks or funds upon which such dividends or annual proceeds might be so placed or invested as aforesaid; so that the said residuary or overplus rents and profits, and the dividends or annual proceeds of the stocks or funds upon which the same might be respectively placed or invested, might accumulate until a fund should be created sufficient to answer, pay and satisfy the said two several sums of 2,500*l.* and 2,500*l.* respectively directed to be raised and paid under the trusts of the said several terms of five hundred years and five hundred years, at which period the said testator directed that the said two several sums of 2,500*l.* and 2,500*l.* should be respectively raised and paid out of such accumulated fund accordingly; and after payment of the said several sums of 2,500*l.* and 2,500*l.*, the said testator directed his said trustees to place out and invest all such residuary or overplus rents, issues and profits as aforesaid, so that the same might accumulate in like manner until a fund should be created

[*34] sufficient *to answer, pay and satisfy the said sums of 4,000*l.* and 2,000*l.* so thereby charged on his said estate as aforesaid, when he directed that such accumulated fund should be sold and disposed of, and the produce thereof applied in pay-

1822.—Bacon v. Proctor.

ment of the same in the proportions and manner thereinbefore mentioned and directed. And after the said several sums of 2,500*l.* and 2,500*l.* and 4,000*l.* and 2,000*l.* respectively, should have been fully raised and paid, the said testator directed his said trustees from time to time to pay, apply and dispose of all the net rents and profits of his said estate unto or for the benefit of such person of his own name, blood and family, as for the time being should succeed to and be invested with his title and dignity of premier baronet of England; to the end, intent and purpose that the said estate might be continued and preserved in the name, blood and family of him the said Sir Edmund Bacon, and that the net rents and profits thereof might be enjoyed and go along with his said title and dignity of premier baronet of England, so long as the rules of law or equity would permit; but if upon or after failure of issue male of his body, there should not be any person who under or by virtue of the letters patent whereby his said title or dignity was originally granted or created, should be entitled to have and enjoy his said title and dignity of premier baronet of England, so that such title and dignity should become extinct, then and in such case and from thenceforth, the said testator willed and directed that his said trustees, and the survivors and survivor of them, and the heirs and assigns of such survivor, should subject and without prejudice to the trusts and directions thereinbefore declared and contained, stand and be seised of and interested in his said estate, in trust for or for the benefit of the person or persons who should then be his right heir or heirs at law, and should convey and assure the same accordingly. And after giving to his eldest son, the said Edmund Bacon, the use and enjoyment during his life *of a certain piece of plate, and directing [*35] that after the decease of his said son, the same should be held, used and enjoyed by the person or persons for the time being who should succeed to his title and dignity of premier baronet of England, so long as the rules of law or equity would permit, the testator devised all his other real estates, and also all his personal estate not specifically bequeathed to his said eldest son, his heirs, executors and administrators. He afterwards

1822.—Bacon v. Proctor.

made two codicils dated respectively the 22d July, 1818, and the 5th April, 1820; by the first of which he revoked the appointment of one of the trustees named in his will; and by the second of which he revoked the bequest of 1,000*l.* and interest, part of the sum of 3,000*l.* and interest given by his will to his son Nicholas, and directed that the sum of 2,000*l.* only should be paid to him with the interest, in the manner directed by his will respecting the sum of 3,000*l.*

The testator died on the 5th of September, 1820, leaving Sir Edmund Bacon his eldest son and heir at law, and the four other children named in his will surviving. Sir Edmund Bacon the son had issue living at the death of the testator, two sons, Edmund and Nicholas Henry Bacon. And the said Nicholas Bacon had issue, then living, a son, Henry Hickman Bacon: but there had never been any other male issue of the sons of the testator. The daughters of the testator had issue several children living at the time of his death.

The bill was filed by Sir Edmund Bacon, against the trustees of the will of the testator, and of the marriage settlements of his daughters, and against the said four other children of the testator, and his said grandchildren; and after stating the letters patent by which the dignity of a baronet was conferred on and limited to Sir Nicholas Bacon and the heirs male of his body, and that the dignity had descended upon the testator, [*36] and upon his death had *devolved to the plaintiff, who was entitled thereto in tail male, the plaintiff insisted that the trusts of the testator's will and his second codicil, or at least such of them as were subsequent to the trusts or directions for accumulation contained in the will, were absolutely void, as being too remote and tending to a perpetuity: and, that as heir at law of the testator, he was entitled to have the real estates respecting which such trusts had been declared, conveyed to him in fee simple, subject only to the charges created by the testator in his lifetime, or at least subject only to such charges and the charges created by his will and second codicil and to the trusts

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for accumulation so far as the same were legal. But if the court should be of opinion that all the trusts of the will and codicil were valid, then the plaintiff submitted that, as answering the description of the first person of the testator's name, blood and family, who had succeeded to and was invested with the title or dignity of premier baronet of England, he was entitled to the real estates in question in fee simple, or at least in tail male, subject to the charges, trusts and directions aforesaid, and that he was entitled to have the amount of such charges forthwith raised by sale or mortgage of the said estates, and to be let into possession of such of the said estates as should not be sold as from the death of the testator, subject, in case the amount of the charges should be raised by mortgage, to such mortgage. He further contended that the legal estate, subject to such mortgage if the same should be made, ought to be conveyed to him forthwith, without waiting till the amount of the charges should be raised by accumulation. But in case the court should be of opinion that the plaintiff was not entitled to a larger interest than an estate for life, and that the amount of the charges ought not to be raised by sale or mortgage, the plaintiff insisted that he ought to be at liberty to pay off the charges out of his own moneys, and the moneys which had accrued or should accrue from the rents of the said premises, and to be let into the possession of the said premises, and that in case of his *decease before he should be reimbursed out of the rents and profits, the deficiency ought to be a charge upon the premises for the benefit of his estate. The prayer of the bill was accordingly. [*37]

The defendants Edmund Bacon and Nicholas Henry Bacon, by their answer, insisted that the trusts contained in the will and second codicil of the testator were valid and legal; and that the plaintiff was not entitled to a larger interest than an estate for his life, in the premises of which the aforesaid trusts were declared by the will.

The defendants Nicholas Bacon, Henry Bacon and Henry Hickman Bacon, submitted that the sums by the will and codicil

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of the testator charged upon the said estate, ought to be raised out of the rents and profits thereof, and that subject to the payment of such sums the estates ought to be settled as the court should direct, so as to go to the person or persons who for the time being should be entitled to the dignity of premier baronet of England, for as long a time as the rules of law and equity would permit.

The defendants, the daughters of the testator, and their children, claimed to have the sums by the will and codicil of the testator given for their benefit, raised out of the estate on which they were charged.

Mr. *Shadwell* and Mr. *Preston*, for the plaintiff:—This is a case *primæ impressionis*, with respect to the trusts for accumulation they are void as far as the grandchildren are concerned, for the statute 39 and 40 Geo. 3, c. 98, only excepts accumulations for the payment of debts, and portions of children and grandchildren are not within the exception. In the next place [*38] this is a trust executed, *and not executory, which distinguishes this case from *Humberston v. Humberston*(a) and the other cases in which the court has acted upon the *cypres* doctrine. Here the testator has executed his own purpose, he has suspended the vesting of the estate till after the payment of debts, an indefinite time which cannot be ascertained by the court. The devise therefore is void; and the trustees become seised of the legal estate in trust for the plaintiff as heir at law of the testator.

On the supposition however of the devise being supported, the next consideration is what was the intention of the testator, and what is the effect of his will. The intention is incompatible with law. It aims at an interest co-extensive with the baronetcy. The law will not permit it to be effectuated beyond the extent of giving either an estate to the heirs male of the body of the

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first baronet, which would give an estate in tail male to the present plaintiff; or by giving successive estates for life within the rule against perpetuities, with remainder to the heirs male of the body of the first baronet.

Mr. *Horne* and Mr. *Sidebottom*, for the sons of the plaintiff:—This is an executed gift in fee to the trustees; the beneficial interests must take effect immediately. The accumulation is a mode of payment only, for the sums secured by the two terms of five hundred years and five hundred years, are antecedent charges on the corpus of the estate, and the sums of 4,000*l.* and 2,000*l.* charged on the estate by the will, are distinct charges, independent of the trusts for accumulation. The legatees of those sums would be entitled to have them raised, even if the trusts for accumulation should be held to be void. The words “from and after” do not *postpone in point of [*39] time, but only in order of interest.(a)

Admitting, however, that the vesting of the estates is to be postponed, there is no doubt that the trusts for accumulation are good to a certain extent; *Griffiths v. Vere*.(b) The consequence must be that the time must be cut down to the legal period of twenty-one years. At the expiration of the twenty-one years, the question will be who is entitled? It is clear that the testator never intended any resulting trust for the heir at law. There is sufficient ground for the court to say that the plaintiff is only entitled for life, with remainder over in strict settlement.

Mr. *Sugden* and Mr. *Rolfe* for the trustees of the will:—Two things are clear, first that the trust for accumulation is not void. Secondly, that the estates take effect immediately subject to the charges, *Tregonwell v. Sydenham*.(c) The only question is as to the person to take, and the quantity of interest. There are two difficulties, first that the dignity is an estate in tail male; secondly, that it was not the intention of the testator to make the common

(a) Cases cited in *Fearne's* opinion on Lord Bath's case, 1 Coll. Jur. 214.

(b) 9 Ves. 127.

(c) 3 Dow P. C. 194.

 1822.—*Bacon v. Proctor.*

Mr. *Lowndes*, for the other defendants.

Graham, Baron:—The question before the court is, whether this is a proper interpleading bill. The evidence offered tends to show that the plaintiff, instead of resting upon the [*31] indemnity of *the court, has taken a security by way of indemnity, and lent his name for the purpose of bringing forward the case in the shape of an interpleading suit. We are of opinion that evidence which tends so much to show the complexion of the bill must be admitted, and that it forms a material feature in the case.

The case was afterwards argued upon the merits, and the bill was dismissed with costs.

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ROLLS.—1822: 4th and 6th December.

The plaintiff's father, upon the marriage of his daughters, demises an estate to trustees upon trusts for raising certain sums, which are settled upon the daughters and their children; and by his will, after charging the estate with other sums to be settled upon the same trusts, with portions for sons, and with a further sum in discharge of a mortgage of another estate, devises it to other trustees, upon trust from time to time to receive the rents and profits, and to invest the same in the purchase of stock, so as to accumulate and form a fund for the payment of the aforesaid charges; "and after the same should have been raised and paid, upon trust to pay the net rents, issues and profits unto or for the benefit of such person of his own name, blood and family, as for the time being should succeed to and be invested with his title and dignity of a baronet, to the end that his said estate might be continued in his name, blood and family, and be enjoyed and go along with his title, so long as the rules of law and equity would permit; but if upon failure of issue male of his body there should not be any person who should be entitled to enjoy his title, upon trust to stand seised of the estate, for the benefit of the person or persons who should be his right heir or heirs at law, and to convey and assure the same accordingly; held that the trust for accumulation was good, and that the plaintiff, the succeeding baronet, took a vested estate for life.

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1822.—Beaumont v. Bramley.

be so made as not to give color to the idea that the purchaser was the impropiator. The receipts do not amount to much evidence, they are receipts given on behalf of the impropiator without stating who the impropiator was: but still they give rise to this observation, that the individual who took the receipts was preserving evidence that he was the individual who paid the money for which such receipts were given, and the person who is supposed to have retained in himself the tithes which might become due from the chase, was preserving no evidence that he was the impropiator; that comes to be material for this reason, that his not having so done is to a certain extent evidence that he did not consider himself at the time as being the impropiator.

If the contract had been for the purchase of the farm lands and other hereditaments, and the conveyance had been made without any express mention of other hereditaments, it seems to me upon the principles laid down in that case of *Stangroom v. Marquis of Townsend*, that if such a case was clearly made out, the court would enlarge the subject of the conveyance, and admitting that if it had been shown on the part of Bramley that there had been an omission in the conveyance, it might have been rectified, *pari ratione* if more has been conveyed than was intended, the court may deduct the excess: but then it must be remembered that if the former is a case of great difficulty, the latter is also a case of great difficulty, and the court must in each case proceed with the greatest possible caution. There is no doubt on the one hand, that if an instrument affects by its recital to carry into execution a certain *agreement [*58] and goes beyond that agreement, the court will rectify it, because then it has clear evidence on the face of the instrument itself, that the instrument operates beyond its intended operation; on the other hand it is quite clear, that parties may enter into articles of agreement, and the terms of the agreement may be extended by parol, provided the conveyance itself is written evidence that there has been such an extension of the parol agreement. If there is nothing but parol agreement addi-

1822.—Beaumont v. Bramley.

tional to the written agreement, the proof of that parol agreement may perhaps be a ground in this court for refusing to execute the written agreement: but the case is quite different where the conveyance recites what is the agreement which the parties intend to carry into effect.

It must be admitted that the valuation relates to the farm and lands only, and that the original intention of the vendor was to sell the farm and lands only. The case then stands thus—this bill is filed in 1812 to cut down a conveyance, which does not in its operative part go beyond what it was the intention of the parties by the recital to do, and does not refer either expressly or otherwise to any articles of agreement, and the question is, whether with respect to the addition of such a property as this, which was not valuable at the time of the contract, or likely to become so, having regard to what is stated in the answer, and to that security to title which ought never to be lost sight of, the court can take upon itself to say that it will cut down the acknowledged effect of a conveyance, after the death of both the parties to the agreement, and after the death of the agent of one of them, and when it appears that the plaintiff does not think fit to address one single question to the agent of the other party, in support of what is alleged about him in the bill.

The recital in the deed has no reference to any written agreement, it does not impart that the parties were then con-
[*54] fining *themselves to the property contained in the written agreement, it is in itself evidence of a contract which goes beyond what the written agreement had specified. If the parties had meant only to carry into execution the written articles of agreement they would have mentioned them. I cannot get rid of the word "tithes" added to the exception of the particular closes. If no tithes were intended to be sold, what occasion was there to insert that exception? The question here is whether the deed does not recite a contract which actually took place, to the effect that Norman should have all the property: if so, that was a new contract, and even if not entered into till the

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moment of executing the deed would have the effect of excluding all preceding contracts, as being a declaration in writing of what was the contract at that time meant to be entered into.

One great reason for using extreme caution in cutting down the effect of a conveyance is, that the court ought to consider what would have been done, if previous to the execution of the conveyance the question had been put to the court, what conveyance should be made in performance of the agreement. Suppose in this case a bill had been filed in the year 1789, praying that these articles of agreement might be specifically performed, surely it would have been competent to the purchaser to say, do not enforce against me a specific performance of these articles, for since the articles have been entered into, a more extended agreement has been made, which renders it unconscionable for the court to decree a specific performance of the articles. Suppose this rectory was to be restored, and the value of this land has fallen from 6,000*l.* to 2,000*l.*, would not the purchaser have a right to say, the agreement, as represented by the vendor, could not have been enforced against me under the circumstances that obtained before the conveyance was executed, and if the vendor is to take back that which he represents he did not mean to convey, on the other hand I must be put in the situa- [*55] tion in which I could have said, unless all that I can prove to have been made the subject of the agreement, is conveyed to me, I mean to take nothing.

In that case of *Stangroom v. The Marquis of Townshend*, I collected the effect of all the authorities with respect to reforming instruments, where it is stated that they have been carried too far or not far enough by mistake. Upon that occasion I looked very accurately through all the cases, and to the principles there laid down I think proper to adhere, and adhering to those principles, I do not think that in a case like the present, where the bill is filed above twenty years after the conveyance was made, where there is an agreement recited in the conveyance itself, not referring to the other written articles of agreement, where the

1822.—*Ex parte Murray.*

parties to the conveyance have long been dead, and where it appears on the face of the conveyance, that to a certain extent at least the agent of the grantor acknowledged the extended agreement, and where the agent of the grantee, the only person alive who could give a personal account of the transaction, is not examined by the plaintiff, whose business it is to make out the case of surprise and mistake, I can say that there is that species of evidence which will enable the court to make the declaration which has been prayed by this bill. Whether the vendor in this case has or not mistaken his purpose, is a question that I think under these circumstances I cannot leave to a jury, I do not mean to say that there may not be cases which should go to a jury, but I am sure that if the principles laid down in the case of *The Marquis of Townshend v. Stangroom* are the principles upon which the court is to act, it must be extremely cautious how it sends such cases to a jury. Upon the principles of the court that appears to me a very dangerous way of proceeding, for undoubtedly more consideration has been given to this case here, than could have been given by any jury. I think [*56] that it is the duty of the court in each case most accurately to sift the circumstances, and to see what are the consequences resulting from those circumstances.

Bill dismissed.

EX PARTE MURRAY.

1822: 20th December.

Solicitor who had become incapable of practising (without being re-admitted), in consequence of having neglected to obtain a certificate for one whole year, ordered to be re-admitted on payment of a small fine only, without the arrears of duty.

THIS was an application on behalf of a solicitor, who having taken out a certificate which expired in November, 1821, and having omitted to take out any certificate since that period, had under the provisions of the statute 37 Geo. 3, c. 90, s. 31, become

1822.—*Ex parte Murray*.

incapable of practising without being re-admitted ;(a) that he might be re-admitted a solicitor of the court, on payment of a fine of 6s. 8d. only without any arrears of duty.

*The affidavit of the solicitor stated, that he had not [*57] practised as an attorney or solicitor in this or any other of the courts of law or equity since the expiration of his last certificate, and that he had been informed at the office of the Master of the Court of King's Bench, that it is the practice of that court to grant re-admissions without compelling payment of the arrears of duty, provided the application for re-admission is accompanied by an affidavit, stating that the party applying has not practised in any of the said courts since the expiration of his last certificate.

Mr. *Beames*, in support of the motion, mentioned the case of *Ex parte Adey*.(b)

THE LORD CHANCELLOR :—Ordered that the applicant should

(a) By the statute of 37 *Geo. 3, c. 90, s. 31*, it is enacted, that every person admitted, sworn, enrolled or registered in any of the courts therein mentioned, who from and after the 1st day of November, 1797, shall neglect to obtain his certificate thereof in the manner therein directed for the space of one whole year, shall from thenceforth be incapable of practising in his own name, or in the name of any other person, in any of the said courts by virtue of such admission, entry, enrollment or register, and the admission, entry, enrollment or register of such person in any of the said courts, shall be from thenceforth null and void; provided always that nothing hereinbefore contained shall be construed to prevent any of the said courts from re-admitting any such person, on payment to the commissioners of the duty accrued since the expiration of the last certificate obtained by such person, and such further sum of money by way of penalty, as the said court shall think fit to order and direct,

(b) *Ex parte Adey*, Lord Chancellor, 16th November, 1816.

Mr. *Adey* having been admitted in all the courts at Westminster in the month of February, 1814, and not having practised or taken out a certificate from the time of his admission, applied to be re-admitted a solicitor of the Court of Chancery on payment of a small fine only without any arrears of duty; the Lord Chancellor ordered that he should be re-admitted a solicitor of the court, if his Honor the Master of the Rolls should so please, upon payment of 6s. 8d. as a fine on such re-admission. [Reg. Lib. A. 1816, fol. 46.]

 1823.—Attorney-General v. Clements.

be re-admitted a solicitor of the court, if his Honor the Master of the Roll should so please, upon payment of such a fine as his Honor should think proper.

[*58]

*ATTORNEY-GENERAL v. CLEMENTS.

1823: 21st January.

The jurisdiction to give effect to an award, confirmed by the decree of the court in the case of a charity, is doubtful: but the renewal of a lease upon the terms of the award, having been twice directed by the court, was again enforced.

THIS was a petition presented by the president and governors of the Bath Infirmary; the infirmary is built upon ground held under an hospital at Bath called St. John's Hospital, upon a lease for three lives, renewable on the dropping of each life upon payment of a fine.

The petition stated, that by a decree, award and final judgment, made, pronounced and signed on the 11th of February, 1716, by Sir John Trevor the then Master of the Rolls, after reciting that in or about Hilary Term, 1711, a bill was exhibited in this court by her then Majesty's Attorney-General at the relation of the then master and co-brethren and sisters of St. John's Hospital, against the corporation of Bath, and that the scope of the said bill was, to have a discovery of the original foundation and settlement of the said hospital of St. John, and of the charities thereto belonging, and of the annual value of the charity lands and possessions, and to have such rules and orders made for the application of the charity estates, and for the government of the charity for the future, as should be thought necessary and convenient; and that the defendants having put in their answers, after examination of witnesses, the cause came on to be heard before the said Sir J. Trevor on the 26th of November, 1713; and that he had heard the proofs taken in the said causes, and what was alleged by counsel on all sides; and after further reciting that all parties had by consent submitted all matters in

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question in the said cause to the award, final judgment and determination of him the said Sir John Trevor, and had agreed that such award or determination as he should make therein, should (by consent of all the said *parties) be confirmed [*59] and established by the decree of the Court of Chancery, and that in order thereto, the master, co-brethren and sisters of the said hospital, had executed an instrument under their common seal to signify their consent to such submission; he the said Sir John Trevor for settling all disputes that had arisen or should arise touching or concerning the management of the said hospital, and of the possessions and revenues thereof for the then present and future time, and for the better and more orderly government of the said hospital, did order, judge and determine (amongst other things) that the master of the hospital, with the consent of the brethren and sisters for the time being, might under their common seal from time to time, as any of the leases should be surrendered or determined upon the death or deaths of any life or lives, or upon the changing of any life or lives, grant new leases not exceeding three lives at the most, and to be nominated by the several and respective tenants, reserving the same rents as were thereby directed to be respectively reserved, and that the fine to be taken on renewing such lease should not exceed one year's value for a life, according to a particular thereto annexed, adding interest for the time such renewal should be neglected by the tenant, to be computed from the end of six calendar months after the former life determined; and that the rents or fines should not be increased without the leave of the court.

The petition then stated, that at the time of making the said decree or award, part of the ground upon which the infirmary now stands, was, together with another small tenement, held by a tenant under the hospital at the yearly rent of 25*l.*, upon a lease for three lives renewable on the dropping of each life, and that 36*l.* was by the particular annexed to the said decree or award, stated to be the annual value of the premises comprised in the aforesaid lease, and that the same premises were held by

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the said tenant and those claiming under him at the
[*60] same yearly *rent, and paying the said yearly value of
36*l.* upon the renewal of each life, till the year 1737.

The petition further stated that in the year 1737, the piece of ground comprised in the aforesaid lease was conveyed to trustees for the purpose of building the infirmary, and that in the year 1738, the infirmary was built thereon, and upon another small piece of ground which then belonged to the corporation of Bath, but which was conveyed to the hospital upon an exchange with the corporation in the year 1805. That in the year 1736, a fine of 36*l.* was paid for a renewal of one life, that in 1743, 30*l.* only was paid for the like renewal, but that on four subsequent renewals, which had taken place between the years 1750 and 1806, fines of 36*l.* had been regularly paid.

The petition then stated, that upon the dropping of one of the lives in the lease of 1806, the sum of 250*l.* had been demanded by the hospital as the fine for a renewal, and prayed that the master, co-brethren and sisters of St. John's Hospital might be ordered to accept of a surrender of the lease granted in 1806, and to grant a new lease of the same premises for the lives of the two remaining *cestuis que vie* and of some other person to be named on behalf of the petitioners, upon payment of the sum of 36*l.*, or that it might be referred to one of the masters of the court to inquire and ascertain what fine ought to be required and paid for the renewal of the said lease, pursuant to the said award or decree.

The petition having been argued on a former day, two instances were referred to, one in 1738, and the other in 1753, in which Lord Hardwicke had acted upon the award upon a petition similar to the present. But the Lord Chancellor then expressed some doubt as to the jurisdiction, and desired that the petition should be mentioned again upon that point.

[*61] *Mr. *Wingfield* and Mr. *Wray* now appeared for the Hospital of St. John to oppose the petition, and contended

that the renewal of the lease could not be compelled consistently with the principles adopted by the court in matters of charity. That a lease executed by trustees of a charity without the order of the court, containing such provisions as were to be found in the award, could not have been supported: and that the decree of the court did not vary the case, as it was made by the consent of the trustees, who had no power to bind the charity.

The *Attorney-General* in support of the petition.

THE LORD CHANCELLOR:—I still entertain great doubts whether the court has complete jurisdiction in this case. It appears that in 1711 an information was filed at the instance of the Hospital of St. John, and according to the habit prevailing at that time, instead of going on in the Court of Chancery with the information, they referred all the matters in dispute to Sir J. Trevor, who was then Master of the Rolls, and he made an award which was afterwards confirmed by the Court of Chancery.

Formerly this court was more in the habit of giving effect to awards than at this day it is accustomed to do. Awards relating to commons are a familiar instance. So where sums of money and land have been awarded in lieu of tithes: Lord Northington set that practice aside,^(a) but whether in cases of charity the court would go so far as Lord Northington did, admits of great doubt, because unquestionably the court has always exercised very large powers in matters of charity.

*With respect to the present charity, in 1738 and 1753 [*62] Lord Hardwicke assumed the jurisdiction upon petition then presented to him. I cannot think that on either occasion he could have done so without consideration. It is perhaps a misfortune that the jurisdiction was ever assumed: but my predecessors have acted upon it, and it is perfectly clear that this property has been enjoyed under this award ever since it was

(a) *Attorney-General v. Cholmely*, 2 Eden's C. C. 304; Ambler 510.

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made. Notwithstanding any doubts, therefore, which I may entertain, if this award is to be disturbed, it must be disturbed by the House of Lords.

The funds of the Bath Hospital not being in a flourishing state, is not a sufficient objection to the application of the other charity. I think the hospital ought to pay an increased fine according to the increased value of the land, which the court has the power of directing; and if you differ as to the amount, there should be a reference to the Master.

A reference was accordingly agreed upon to the Master to ascertain the fine.

 [*63]

*LYNN v. BEAVER.

1822: 18th December. 1823: 22d January.

Executor, taking a contingent reversionary interest under the will, not precluded from giving evidence of the intention that he should have the residue beneficially, nothing upon the face of the will indicating that he was to take the office merely. Under the effect of the will and the evidence, the executor was declared to be entitled beneficially. Whether the contingent reversionary interest would have had the effect of rendering him a trustee for the next of kin. *Quære.*

Claiming the residue as executor, is sufficient to let in parol evidence in support of the legal title, without alleging a title by the effect of the parol evidence.

Bequest in terms importing an intention not to make an immediate disposition, may, upon the construction of the whole will, amount to a present bequest.

The motives which might influence the testator in favor of the executor, are to be considered in determining the question, whether the executor takes the residue beneficially.

RICHARD BOLT made his will, dated the 20th of September, 1813, in the following words: "I Richard Bolt do make this my last will and testament as follows, first I annul all former wills, &c.; and after my debts and funeral expenses are paid or settled to be paid to those persons I will as rewards for long services. Secondly, I will and bequeath unto my dear wife

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Esther Bolt, the annual interest of my property in the funds at my decease in the little I leave in the 3 per cents. reduced, 3 per cents. consols, and 4 per cents. ditto, not any to be sold out, as I may will it after her decease to her sister Rachael Beaver, and my wife's nephew Richard Beaver, who I leave an executor to this my will. Also I will and bequeath unto my dear wife the annual profits of shop trade, the stock not to be lessened, to be hers for life, after all expenses paid; the rent to be paid in her name for life, and her name over the door singly—Bolt; all the necessary articles for house and people not to be sold, to be managed by Richard Beaver the executor, and Rachael Beaver his aunt, with the approbation of my wife, if living. Also I will that my wife is under conditions and stipulations for performing what I leave to any one I mention in this will, whether in a sum down or annual stipend for life or for long services, and to be paid as I will and bequeath it from the shop trade or the funds as I mention it, to pay from and after my wife's I will and bequeath Rachael Beaver and Richard Beaver equal shares in the profits of business for life, the survivor to have the whole on condition of observing the will and paying donations that I will and bequeath at any period, I will it as they are the particular heirs after my wife, the stock of shop not to be divided, as I only will the profits or interest to the survivor of the three persons already named. Also I will Rachael Beaver my *wife's shopwoman and Richard Beaver in the same [*64] situation, they are to have all the privilege of living in sickness or health, allowing Mrs. Bolt the interest of what little property they have, I hope either will leave my wife in case of vicissitude and losses, and she has been as free to give when I have an act of kindness I wished to perform.

The testator died on the 20th of August, 1817, and the executor Richard Beaver obtained probate of his will.

The bill was filed by Daniel Lynn and others alleging themselves to be the next of kin of the testator, against Richard Beaver, Esther Bolt and Rachael Beaver; contending that the

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plaintiffs had an interest in the testator's personal estate, and praying an account and a distribution of the residue.

The defendant, Richard Beaver, as executor, claimed the residue for his own benefit.

Upon the hearing of the cause before the Vice Chancellor, on the 28th of February, 1821, it was referred to the Master to inquire who were the next of kin of the testator. The Master, by his report dated the 18th of December, 1821, stated that Thomas Forster, who was not a party to the cause, was the only next of kin of the testator. After the Master had made his report Thomas Forster filed a bill and died, and exceptions having been taken to the report, the Vice-Chancellor, upon hearing the exceptions, directed an issue to try whether Lynn and others, the plaintiffs in the first cause, were the next of kin of the testator; and ordered that the personal representatives of Forster should be at liberty to attend the trial, and join in the defence. The plaintiffs in equity were to be plaintiffs at law, and the defendant, Richard Beaver, the executor, was to be defendant at law.

[*65] *From the decree directing the issue the defendant Richard Beaver appealed, and moved that the trial of the issue might be stayed till the hearing of the appeal. On the motion being made it was arranged, by the consent of the plaintiffs and defendants and of the representatives of Forster, that the cause should be considered as coming on to be heard upon the construction of the testator's will, and upon the question whether the executor was entitled to the residuary personal estate for his own use, or was a trustee for the next of kin.

Mr. *Sugden*, Mr. *Joseph Martin* and Mr. *Lynch*, for the plaintiffs.

Mr. *Hart* and Mr. *Barber*, for the representatives of Forster.

Mr. *Shadwell*, for Rachael Beaver.

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Mr. *Pepys*, for Esther Bolt.

Mr. *Horne* and Mr. *Knight* for Richard Beaver.

The defendant Richard Beaver went into parol evidence, and proved declarations by the testator that he intended his executor to take the residue. The plaintiffs' counsel objected to the evidence being admitted.

For the plaintiffs:—There is no allegation in the answer that the executor intended to adduce parol evidence in support of his legal title. Had the plaintiffs been apprized that these declarations were intended to be proved, they might have cross-examined the defendant's witnesses, and produced evidence of declarations by the testator of a contrary tendency. An *executor taking a partial interest cannot enter into [*66] parol evidence to show that he is entitled to the general residue.

THE LORD CHANCELLOR:—Considering the rule to be settled that an executor is permitted to give parol evidence in support of his legal title, if the answer insists that the defendant is entitled as executor, no allegation is necessary to put in issue that he is entitled by the effect of parol evidence, that being included in the allegation that he is entitled as executor. The evidence was directed to be read subject to the question of its being admissible.

The cause then proceeded: for the plaintiff it was contended that the gift of a reversionary interest excludes an executor from the residue. *Seley v. Wood*.(a)

For the defendant Richard Beaver the executor:—There is nothing in this will to control the legal right of the executor, the benefits given to him by the will are given only for the purpose of letting in exceptions in favor of others; where a legacy is

(a) 10 Ves. 71.

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given by way of exception out of the general gift to another, or for the purpose of letting in an exception in favor of others, the court will not infer an intention on the part of the testator to exclude the executor from the surplus. *Lady Granville v. Duchess of Beaufort*, (a) *Newstead v. Johnston*, (b) *Griffith v. Rogers*, (c) *Clennell v. Lewthwaite*. (d)

*THE LORD CHANCELLOR:—I do not trouble myself [*67] with the question, whether any person looking at this will from beginning to end would have considered it to be a finished will, because with respect to wills of personalty, after probate has been granted by the ecclesiastical court, this court is bound by the judgment, and has no jurisdiction to try whether the will is complete or not.

After reading the will, the Lord Chancellor observed upon the clause by which the testator bequeathed to his wife the annual interest of his property in the funds—"Not any to be sold out, as I may will it after her decease;" that although the word "may" seemed to import an intention on the part of the testator to do something in future, and not to make a present bequest, yet that if it was necessary to decide the question, the clause would in all probability be held to amount to a present bequest upon the construction of the whole will.

His Lordship then proceeded—taking it for granted then that this is a complete testamentary instrument, the effect of the whole is, to give the annual profits of the funded property and of the stock in trade to the wife for life, and after her decease to leave the profits of the business to Rachael Beaver and Richard Beaver, with such interest to the survivor as he or she may take under the words of the will. It is observable that the interest here given to the executor is a contingent reversionary interest, for if he should die in the lifetime of the wife, he could take no share in the profits of the trade. It appears too, in evidence, that

(a) 1 P. Williams, 114.

(b) 2 Atk. 45.

(c) Prec. Ch. 231.

(d) 2 Vcs. jun. 465, 644.

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the testator carried on business for forty years in Sidney's Alley, not indeed in his own person, for his wife, his wife's sister, and her nephew the executor, conducted it for him; that he considered himself under great obligations to these three persons, and that he thought *that he had no relations. These [*68] are circumstances which must be taken into consideration, where the question is, what the testator meant when he appointed this man his executor, whether he intended him only to take the office, or to have a beneficial interest in all the property undisposed of: but at the same time it would be difficult to say, that the trust raised by the court in such cases should be put an end to, upon the effect of evidence going no further than that.

It is not necessary to cite authorities in order to prove the principles upon which the court proceeds in cases of this nature. There is no doubt that where, upon the face of a will, it appears that the executor was intended to take the office only, where the testator has raised a trust which fails of being carried into effect, or where he has clearly intended to create a particular trust, which he has failed in doing, the next of kin will take as against the executor. On the other hand it is equally clear, that if the case be a case of a mere legacy given to an executor, where the presumption of law is to be acted upon that the testator could not mean to give all and part, a presumption, which, whether reasonable or not, the court is bound to act upon, as the doctrine has been so long laid down, the executor may rebut the presumption by parol evidence; always having regard to the nature of the evidence, to declarations which were made, as in this case for instance, before the testator made his will, at the time of making his will, and after he had made his will; and in giving effect to all the declarations, having regard to the circumstances under which they were made.

There is a circumstance in this case, which I have not been able to find in any other case, that the bequest which raises the presumption against the executor, is a bequest not simply of a

1823.—Lynn v. Beaver.

reversionary interest, but of a contingent reversionary [*69] interest; observing that it was taken for *granted at the bar, that the bequest of a reversionary interest would exclude an executor from the residue, I asked whether there were any cases on the subject; I have been referred only to the case of *Seley v. Wood*, decided by Sir William Grant, a judge for whom I must always feel the highest respect. Upon that case I can only say, that it is singular in its circumstances, and I think I may add singular in its decision. I do not intend by any means to say that the decision may not be right: but if no more is to be found on the subject of reversionary interests, and particularly of contingent reversionary interests, that is a case which I should find some difficulty in following as an authority in the present instance.

Taking it for granted however that this contingent reversionary interest would exclude the executor, there is nothing upon the face of this will to show that the executor was intended to take the office merely, all the cases have established that under such circumstances parol evidence is admissible: the question, therefore, is reduced to this, whether, supposing this contingent reversionary interest to be a good gift to bar the executor, I can say that the evidence is sufficient to rebut the presumption. The widow of the testator swears to what passed between her and the testator after making the will; that the testator holding the will in his hand, stated what in his judgment was its effect; not indeed with any great accuracy, for to do justice to the testator, it was out of the power of any man living or dead to state accurately what was the effect of the will, but on one point he was quite distinct, that he intended his executor to take his property. I am, therefore, of opinion upon the whole, that this is a case in which the next of kin cannot raise the trust; and that the executor takes what is undisposed of by the will. On account of the great difficulty of construing this will, I think the fair thing is that the costs of all parties should be paid out of the estate.

[*70] *The following decree was made:—His Lordship doth

 1823.—*Williams v. Attenborough.*

declare, that under the effect of the will of the testator Richard Bolt, and the evidence taken in this cause, the defendant Richard Beaver is not a trustee for the said testator's next of kin of the clear residue of his personal estate: but the said defendant, as executor of the said testator, is entitled to retain for his own absolute use and benefit the said clear residue, but subject to the payment thereof of the costs hereinafter directed.

And by consent it is ordered to be referred to the Master to tax the costs of the plaintiffs and Rachael Beaver of this suit, and also the costs of the said Thomas Forster deceased, and of the representatives of the said Thomas Forster, in the cause of *Forster v. Beaver*, and of the proceedings in the said Master's office in this cause under the order of the 28th day of February, 1821. And it is ordered that the said defendant Richard Beaver do pay such costs when taxed, out of the personal estate of the said testator; and after providing for the return of the deposit, it is ordered that the plaintiff's bill do stand dismissed out of this court.

 WILLIAMS *v.* ATTENBOROUGH.

1823: 22d and 23d January.

The rules which regulate the practice of opening biddings upon a sale of landed estate, do not apply when a colliery is the subject of sale.

Upon an offer to give 10,000*l.* for a colliery, sold for 8,850*l.*, a motion to open the biddings was refused.

The rule is not universal that biddings shall not be opened in favor of parties present at the sale.

Residuary legatee, tenant for life, or reversioner, may become the purchaser of an estate sold in the Master's office.

The person who opens the biddings is discharged if he is outbid at the resale.

HENRY ATTENBOROUGH having devised his real and personal estate to trustees, upon trust to sell, and to stand possessed of the moneys to arise from the sale upon trusts for the benefit

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[*71] of his children, this suit was *instituted for the purpose of having the property sold under the directions of the court.

By an order, dated the 4th of December, 1821, the property was directed to be sold, and an agent for the parties interested was to be at liberty to make one bidding for each lot. The reserved bidding was to be made upon paper, to be delivered under cover to the person appointed to sell the estates, previous to the same being put up to sale, and in case no higher price was bid than the sum mentioned in the paper, it was to be declared that the lot was bought in.

One of the lots, consisting of a colliery and other property, having been bought in under this order, by a decree in the cause, dated the 25th of June, 1822, a resale was directed, and the agent for the parties interested was empowered to bid as often as he should think proper for each lot to be put up upon the resale.

On the 27th of July, 1822, the colliery was accordingly put up to sale in a separate lot. Upon that occasion an agent of the parties interested attended at the sale, and a person of the name of Bourne was declared the purchaser of the lot, at the sum of 8,850*l*.

The confirmation of the purchase having been accidentally delayed, a motion was made to open the biddings on behalf of Syson, a person who turned out to be a fictitious bidder, being a day laborer in the service of one of the parties in the cause; that motion was refused: but a person of the name of Thorn having offered to give 10,000*l*. for the lot, the Vice-Chancellor directed the biddings to be opened upon his application.

It was now moved on the part of Mr. Bourne, that
[*72] the *order of the Vice-Chancellor, by which the biddings were directed to be opened, might be discharged.

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The affidavits in support of the motion rendered it doubtful whether Thorn was a *bona fide* bidder. From the time of the second sale the colliery had been worked by Bourne, at a considerable expense, under the superintendence of the devisees in trust of Attenborough; and it was represented by the persons beneficially interested, that the management had been very disadvantageous.

Mr. Agar and Mr. Horne for Mr. Bourne: Thorn is merely an agent for the parties interested in the estate. In favor of the parties interested the biddings cannot be opened, their agent having been present at the sale. In the ordinary case of opening biddings, the property remains in the same state in which it was at the time of the sale: but Mr. Bourne having embarked his capital in the management of this concern, is at least entitled to be indemnified for the expense he has incurred.

Mr. Shadwell and Mr. Pemberton for Mr. Thorn.

Mr. Rose for the devisees in trust of Henry Attenborough.

Mr. Heald for the defendants beneficially interested in the produce of the sale.

Mr. Treslove for the plaintiffs:—The parties interested in the sale have a right to open the biddings; *Hooper v. Goodwin*.(a) Whether they *apply in their own name, or in [*73] the name of another person, can make no difference.

THE LORD CHANCELLOR:—This being a motion to open the biddings, Mr. Bourne must be considered as the person at present entitled to the purchase; considering him, therefore, as the purchaser, the true question is, whether, having regard to the nature of the property, and the manner in which it has been treated in the Master's office, together with all the circumstances

(a) Coop. Ch. Cases 95.

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of the case, the biddings ought to be opened; I say, having regard to the nature of the property, because it has been solemnly determined in this court, that the sale of a colliery is not like the sale of a landed estate, and that a purchaser under the decree or this court, is not entitled to call for an account of the profits of a colliery from any particular quarter day, as upon the sale of a landed estate he is entitled to do.^(a) Collieries and landed estates are quite different in the contemplation of this court; a colliery being always considered as a trade, the profits accruing from day to day as in all trading concerns. There are decisions of Lord Hardwicke's to that effect, where he held that a bill would lie for an account of the profits of a colliery, although for an account of the rents and profits of real estate no bill could be maintained. With reference to opening the biddings, the nature of the property forms a very material consideration. Land generally speaking keeps pretty nearly to the same value, although there may be indeed accidental changes in the value of land from temporary causes; but collieries are liable not only to fluctuations in value, but to destruction; they are like land in a country liable to earthquakes. The case of *Wren v. Kirton* is a remarkable illustration of the principle which ought to [*74] govern the resale of collieries. On the first sale in that case a colliery was sold for 23,000*l.*, the court opened the biddings, as it turned out, for a fictitious bidder. The consequence was, the property fell first to 12,000*l.*, then to 6,000*l.*, and although it was ultimately sold for 15,000*l.*, there might have been a loss of the difference between 23,000*l.* and 6,000*l.*, and there was an actual loss of the difference between 23,000*l.* and 15,000*l.* Such is the species of this property, that it is almost impossible for the court to model the security, to be given by the person applying to open the biddings, in such a way as to avoid the possibility of loss; a deposit of 10*l.* or 20*l.* per cent. cannot be sufficient, for in many cases it will evidently be better to forfeit the deposit, than to take the property, better to forfeit 1,000*l.* than to take a property which may sink in the proportion stated

(a) *Wren v. Kirton*, 8 Ves. 502.

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from the case of *Wren v. Kirton*. Again, upon a resale of the property, the purchaser may be tired of his bargain before he has completed his purchase, and although it is true that the court may compel the final bidder to pay the money, the process is such, that in a great many cases it is more for the interest of the vendors to abandon the bargain, than to put in force the process of the court. From these considerations it has always appeared to me, that where the subject of a sale is a colliery, a trade of so very hazardous a nature, in which there is always such a vast deal of speculation, and such a great number of speculators, you cannot apply the same rules, which are applied to purchasers of landed estates. The property is liable to such variations in value in very short intervals, the blasting of a mine, or any other accident, even a change in the markets, or, to take an instance at the present moment, the stoppage of a navigation by frost, may make such a difference in the course of a week, that in all these cases it is the duty of the court to consider, as the Vice Chancellor appears to have done very fully and properly in Syson's case, not what the particular interest of the suitors in any particular cause would require for their advantage, but what the *general principle ought to be with reference to the general benefit of the general suitors of the court. [*75]

When Thorn's case came on before the Vice-Chancellor, he seems to have lost sight of the principle which he had laid down in Syson's case, and to have thought that Thorn, if he was a *bona fide* bidder, had some sort of right to open the biddings. Now no one can be said to have any right to open the biddings, since it is always in the discretion of the court to grant the application or refuse it. The question is, not whether the person applying is a *bona fide* bidder, but whether regard being had to the nature of the property, the circumstances of the case, and the general interest of the suitors of this court, not the interest of purchasers in the Master's office, so much advantage is held out as to induce the court to open the biddings. During a period of nearly half a century which I have passed in this court. and

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in which Lord Apsley, Lord Thurlow, the Lords Commissioners, with Lord Loughborough at their head, then Lord Loughborough as Chancellor, and after him the Lords Commissioners, with Lord C. B. Eyre at their head, have presided here, I have heard one and all of them lament, that the practice of opening biddings was ever introduced. I confess that I have great doubts myself upon the subject: but after a practice so long established it is not for me to disturb it. This method however of authorizing parties to bid at the sale is quite modern, and requires a great deal of consideration, as there can be little doubt that it has the effect of damping the sale; so highly did Lord Kenyon disapprove of parties interested in the sale bidding by themselves or their agents, that if there was a suspicion that any agent on the part of the vendor had been bidding in the Master's office, he would not enforce the execution of the contract.

There is another view of this case taken by Mr. *Agar* which is entitled to a great deal of weight, how far these [*76] *parties may be considered by their agents to have been present at the sale. The court indeed has not adopted it as a universal rule, that the biddings shall not be opened in favor of parties who are present at the sale: but that circumstance undoubtedly furnishes a very strong objection to the interference of the court. The case of *Goodwin v. Hooper*, in which a residuary legatee was allowed to open the biddings, has been cited in argument. There can be no doubt at this time of day that a residuary legatee may become the purchaser of an estate sold in the Master's office, so may a tenant for life, or the owner of a reversionary interest: but if the matter were *res integra* I should have great doubts whether they ought to be allowed to do so; they thereby frequently contrive to buy the fee simple at a rate at which no one else could get it; from their knowledge of the property they stand nearly in the same situation as trustees, who are excluded on this ground from bidding for trust property.

In this case upon the second sale Mr. Bourne became the purchaser; and as the purchase could not be confirmed for a con-

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siderable time, it became absolutely necessary to take into consideration who should have the intermediate management. It was finally agreed that Mr. Bourne should work the colliery under the superintendence of the trustees; it would have been folly in the purchaser if he had not insisted on having, in some measure, the management: for if, between the day of bidding and the confirmation of the purchase, the value of the mine had fallen, from some accidental cause injurious to the working, from some rival coal mine, or a destructive inundation, still if the title had been completed at the time his report was confirmed, he would have been compelled to take the property. Without entering into the question in this case, whether the management has been advantageous or disadvantageous, let us suppose that the management has been advantageous; nobody can deny that to discharge a purchaser under such *circumstances, [*77] upon giving him his costs merely, without making some allowance for the expense incurred in the management, would be treating him in a way very detrimental to the general interest of all those who have collieries to dispose of through the intervention of this court.

If the case turned upon Thorn's being a *bona fide* bidder, there must have been further inquiry: but I have said quite enough to show, that regard being had to the nature of the property, these biddings ought not to be opened. You cannot lay down rules which would be generally mischievous, in order to give a benefit to particular individuals. It is probable that if Thorn is a *bona fide* bidder, he may not be intended by these parties to become the final bidder. At all events it may turn out that somebody else will bid more—then how is the security to be managed? The deposit of the whole money will not secure us from the possibility of a loss, because if there is one person who bids more, Thorn will be discharged, and his deposit can never be made a security for such subsequent bidder. In that case of *Wren v. Kirton* the court was disposed to open the biddings, if security was given to answer the difference between the produce of the resale and the 15,000*l.*: but it is extremely difficult to

1823.—Withy v. Cottle.

manage the security unless the whole money is paid into court, to remain in court as a pledge that the next purchaser shall perform his contract.

The order of the Vice-Chancellor, directing the biddings to be opened, was discharged.

[*78]

*WITHY v. COTTLE.

1823: 31st January; 5th and 7th February.

Upon a motion for a reference of title, where the performance of the contract is resisted upon other grounds, the court will look into the answer to see whether these other grounds are substantial or frivolous.

Where the subject of the contract was a life annuity, and the defendant insisted that time was of the essence of the contract, a motion for a reference to the Master upon the title was refused.

The nature of the property sold may make time of the essence of a contract.

THIS was a suit for the specific performance of an agreement to purchase a life annuity. The annuity was put up to sale by public auction on the 15th of June, 1821: it was not then sold, but shortly afterwards the defendant agreed to become the purchaser, according to the conditions of the sale by auction. Those conditions provided, that the purchaser should pay down a deposit of 20 per cent., in part of the purchase money, and should sign an agreement to pay the remainder on or before the 20th of July, 1821, and should thereupon have a proper assignment of the annuity. The defendant stated in his answer objections to the title, and further insisted that time was of the essence of the contract, and that inasmuch as for the reasons stated in the answer, the plaintiff did not show a good and marketable title to the annuity, according to the conditions of sale, before or on the 20th of July, 1821, or before the filing of the bill, he was not bound to perform the agreement.

Upon the coming in of the answer, a motion was made before the Vice-Chancellor for a reference to the Master upon the title;

1823.—*Withy v. Cottle*.

and it was contended upon the authority of *Boehm v. Wood*,^(a) that although the defendant resisted the performance of the agreement upon other grounds than mere defect of title, the court would look into the answer to see whether the other objections were substantial or frivolous. It was insisted, however, by the defendant, that as the case did not rest upon the question of title merely, the court was precluded from directing the reference, *Blyth v. Elmhirst*. The cases cited not appearing to be *reconcilable, his Honor directed the motion to be made [*79] before the Lord Chancellor.

Mr. *Sugden* and Mr. *Seton* for the plaintiff, insisted that by the inspection of the record, it would appear that time could not be of the essence of the contract; and relied upon *Boehm v. Wood*.

Mr. *Hart* and Mr. *Stuart* for the defendant, distinguished the present case from that of *Boehm v. Wood*, inasmuch as there it was clear from the circumstances that time was not of the essence of the contract: but that upon the sale of a life annuity, or a reversionary interest, delay for one or two years was of the utmost importance.

THE LORD CHANCELLOR:—The rule which has been adopted of late years, to direct a reference to the Master in the first instance upon the question of title, does not prevail where the performance is resisted on other grounds: but when the court has got the length of deciding that, it will take great care to look into the answer, for the purpose of seeing whether those other grounds are substantial or frivolous. With respect to time being made of the essence of a contract, there has been a great diversity of opinion: but it has never been denied, that the property sold may be of such a nature, as to make time of the essence of the contract, although the contract does not contain one single word about it. In that case of *Boehm v. Wood*, the court upon

(a) 1 Jac. & Walk. 419; 1 Ves. & Beam. 1.

1823.—*Withy v. Cottle*.

looking into the answer saw the circumstances upon which it was contended that time had been made of the essence of the contract, and thought that that effect had not been produced: but it seems to me that the nature of the property may [*80] make *a very material difference; great consideration may be due to circumstances in one case, to which no attention would be paid in another. His Lordship concluded by observing that he would look into the answer.

February 5th.—THE LORD CHANCELLOR:—The objection which has been made to this motion is, that this is not a case in which the defendant puts the matter upon the question of title merely, but insists that time was of the essence of the contract, and that if a good title can now be made, he is not bound to take it. The question is, whether that suggestion made by the defendant, will be sufficient to take the case out of the common rule. It strikes me that a great deal depends upon the nature of the property sold. If it be property, which by delay will not be of the same value as at the time of the sale, it forms a material consideration. In the case for instance of a contract to grant an annuity for the life of an individual, if you do not show that you can grant the annuity, you prevent the party from selling or dealing with it, and in the meantime the individual for whose life the annuity is to be granted may die. It seems to me that the short way of disposing of this case will be, to set the cause down upon bill and answer, and discuss the point, whether the nature of the property does make time of the essence of the contract.

On a subsequent day, the counsel for the plaintiff having stated that the cause could not be heard upon bill and answer, the Lord Chancellor said that they must proceed to a hearing in the regular course.

1823.—Howard v. Ducane.

*HOWARD v. DUCANE.

[*81]

1823: 7th February.

A power of sale and exchange vested in the trustees of a settlement, may be exercised by the trustees upon a sale to or an exchange with the tenant for life of the settled estates.

Where upon the exercise of such a power it is declared that the estate shall be vested in the purchaser, the purchase being made in the name of a trustee, an appointment to the trustee, in trust for the purchaser, is a valid execution of the power.

By an indenture, dated the 10th of June, 1770, the rectory and tithes of Horsham, together with other hereditaments, were limited to the use of Sir Thomas Broughton for life, with remainder to the use of Lady Broughton for life, with remainder to the use of all and every or such one or more of the younger children of Sir Thomas and Lady Broughton as they should jointly appoint, and in default of such joint appointment, as Sir Thomas Broughton, if he survived, should appoint, and in default of appointment, to the use of all such younger children as tenants in common in tail general, with divers remainders over; and a power was given to Robert Hill and Charles Goring, at any time during the lives of Sir Thomas and Lady Broughton, and with their consent and direction, to be testified by writing under their hands and seals and to be attested by two or more credible witnesses, to sell or exchange all or any part of the said rectory, tithes and other hereditaments, and the whole estate in fee and inheritance therein, and it was declared that when any part of the said premises should be sold, the same should thenceforth be freed and discharged from the uses by the said indenture declared thereof; and that then and from thenceforth the said indenture, and a fine therein mentioned to be intended to be levied by the said Sir Thomas and Lady Broughton, and all conveyances and assurances theretofore made or executed, or at any time thereafter to be made or executed, of the said rectory, tithes and other hereditaments, should be and inure, as to so much of the said premises as should be so sold, to the only use

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and behoof of the purchaser or purchasers thereof, and of his, her and their heirs respectively forever.

[*82] *By indentures of lease and release, dated the 23d and 24th of November, 1781, the release being made between the said Robert Hill and Charles Goring of the first part, Charlotte Wicker of the second part, Francis Weller Poley of the third part, the said Sir Thomas Broughton and Dame Mary his wife of the fourth part, and Henry Hoyle Oddie of the fifth part, reciting, amongst other things, that the said Henry Hoyle Oddie, on the behalf of the said Sir Thomas Broughton, had agreed with the said Robert Hill and Charles Goring for the purchase of part of the tithes belonging to the said rectory of Horsham: it was witnessed, that the said Robert Hill and Charles Goring, in pursuance and exercise of the power in that behalf reserved by the said indenture of the tenth of June, 1770, with the consent and direction of the said Sir Thomas Broughton and Dame Mary his wife, testified by that indenture under their hands and seals and attested by two credible witnesses, did grant, bargain, sell, alien, release and confirm, and the said Sir Thomas Broughton and Dame Mary his wife did, in pursuance of every power and authority enabling them in that behalf, grant, bargain, sell, release, ratify and confirm, unto the said Henry Hoyle Oddie and his heirs, the said tithes so agreed to be purchased: to hold to the said Henry Hoyle Oddie, his heirs and assigns, to the use of the said Sir Thomas Broughton and Henry Hoyle Oddie, their heirs and assigns forever: but nevertheless as to the estate of the said Henry Hoyle Oddie, his heirs and assigns, in trust for the said Sir Thomas Broughton, his heirs and assigns.

By other indentures of lease and release, dated respectively the 26th and 27th of November, 1781, reciting, amongst other things, that the said Sir Thomas Broughton, being seised in fee simple of a certain manor and other hereditaments, had proposed to make an exchange thereof with the said Robert Hill and Charles Goring for the said rectory of Horsham, and

[*83] such of the tithes belonging *thereto as were not con-

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veyed by the said last-mentioned indenture. The said Robert Hill and Charles Goring did, in exercise of the powers and authorities reserved to them by the said indenture of the tenth of June, 1770, with the consent of the said Sir Thomas and Lady Broughton, testified by the said indenture of release under their hands and seals, and attested by two credible witnesses, grant, bargain, sell, alien, release and confirm to the said Sir Thomas Broughton and his heirs, the said rectory and tithes: to hold to the said Sir Thomas Broughton his heirs and assigns, in exchange for the said manor and other hereditaments thereby granted and released, by the said Sir Thomas Broughton, to the said Robert Hill and Charles Goring and their heirs, to the uses of the said indenture of the tenth of June, 1770.

A contract having been entered into for the sale of part of the tithes, by persons who derived the property from Sir Thomas Broughton, the purchaser objected to the title, on the ground that the sale to and the exchange with Sir Thomas Broughton, were not valid executions of the powers of sale and exchange vested in the trustees by the indenture of the tenth of June, 1770, inasmuch as Sir Thomas Broughton was by such last mentioned indenture, required to be a consenting party to any sale or exchange to be made by the trustees under the power.

The bill was filed for a specific performance, and the cause was now brought on for the purpose of obtaining the opinion of the court upon the objection taken by the purchaser.

Upon the hearing, another objection was made to the title, that as the deed creating the power, declared that when any of the premises should be sold, the same should be vested in the purchaser; the appointment by the deeds of the 23d and 24th of November, 1781, ought to have *been made [*84] to Sir Thomas Broughton, and the power was not well exercised by appointing to Oddie, to the use of Sir Thomas Broughton.

Mr. Hart for the plaintiff.

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Mr. *Shadwell* and Mr. *Blackburn* for the defendants :—The first question to be determined is, whether, where a power of sale is to be exercised with the consent of a tenant for life, a court of equity will allow the tenant for life to become the purchaser. At law no objection can be made to an exercise of the power in favor of the tenant for life; but in equity, *quoad* his consent, he is a trustee: the court will not allow him at the same time to be trustee and *cestui que* trust. There has been no judicial decision upon the point: but in 1801, upon a transaction similar to the present, in which Lord Sefton was concerned, it was proposed to pass an Act of Parliament to meet the difficulty, and the judges, Sir Archibald Macdonald and Baron Hotham, to whom the Act was referred, thought that there was no occasion for it.(a)

(a) Mr. *Shadwell* has kindly furnished the editors with a note of the certificate returned by the judges to the House of Lords in this case.

After setting forth certain indentures of lease and release, dated the 11th and 12th of February, 1796, by virtue of which Lord Sefton was tenant for life of the estates therein comprised, and which contained a power of sale and exchange to William Lord Craven and John Charles Crowle; and also certain other indentures of lease and release dated the 11th and 12th of July, 1800, by which certain parts of the estates comprised in the former indentures were conveyed to Lord Sefton, in exchange for other estates conveyed by him to the uses of the settlement; and after stating that Lord Sefton having since the said exchange contracted for sale of various parts of the estates received by him in exchange, doubts had arisen whether the power of exchange so entrusted by the said marriage settlement was exercisable by the said trustees, William Lord Craven and John Charles Crowle, on an exchange with Lord Sefton, in respect of his being tenant for life of the settled estates so made exchangeable.

The certificate proceeds in the following words.

We have perused and signed the bill annexed; and we think the bill, if, for the purpose, therein expressed any bill should be deemed necessary, is proper. But we submit it as our opinion to your Lordships, that the doubt which is the cause of petitioning for the bill is not well founded, therefore that the bill is unnecessary.

And we submit it to your Lordships that the passing of such a bill may cause a great prejudice to numerous titles under executions of powers of sale and exchange of a similar kind.

(Signed.)
April 27th, 1801.

ARCH'D MACDONALD.
B. HOTHAM.

1823.—Howard v. Duane.

Your Lordship has often expressed *disapprobation of [*85] tenants for life being permitted to purchase the settled estates.

There is another objection to the title. The deed declares that upon payment of the purchase money the property sold shall be vested in the purchaser. The power can be executed at law only by adhering to the letter; the trustees in this case had not the legal estate, they were merely donees of the power; the consequence is, that the execution of the power operates as an appointment to Oddie of the legal estate; Oddie is an agent merely, and the power, therefore, is not well executed at law.

THE LORD CHANCELLOR:—The cases in which I have expressed my disapprobation of tenants for life having been permitted to purchase the *settled estates, have [*86] been cases where the property has been sold under the directions of this court; when a sale takes place in the Master's office, the tenant for life is the only person who knows anything about the value of the estate, and he therefore buys at a great advantage: but there is a difference between that case and the present; for here the consent of the tenant for life is not all that is necessary, there must be a diligent attention on the part of the trustees to see that they get a reasonable price. There may undoubtedly be cases in which more may be obtained from the tenant for life than from any other person, and if practice has sanctioned such transactions as the present, I am sure I will not disturb them.

With respect to the second point, there is nothing in the nature of such a power as this to prevent one man from becoming a purchaser in trust for another; and considering Mr. Oddie as the purchaser, it does not appear to me to be any objection to the

By a letter annexed to the foregoing note, it is stated that the judges to whom this bill was referred, having been struck with the importance of the question raised upon the power of exchange, delayed signing their report till they had an opportunity of consulting the other judges upon the subject.

1823.—*Balch v. Symes.*

execution of the power, that the parties have thought proper to put upon the instrument a declaration of trust for the person for whose benefit he is a purchaser. It appears to me to make no difference, whether the purchaser chooses to execute a declaration of trust by the same instrument, or by another instrument.

From the way in which the two judges put their opinion upon the case before the House of Lords, I think they must have proceeded upon the practice of conveyancers; and if the practice was in favor of such transactions before the judges certified, and continued so for some time afterwards, I will not unsettle it upon any subsequent doubts which may have been entertained. I should have said originally that it would not do: but whatever other people may say upon the subject, I think that the practice of conveyancers has settled a great deal of law, and if we have got no further than this, that the antecedent practice has been doubted, I should be disposed to abide by [*87] *that antecedent practice. I put this case, therefore, on the practice of conveyancers, and after the abuse which I have heard at the bar of the House of Lords and elsewhere upon that subject, I am not sorry to have this opportunity of stating my opinion that great weight should be given to that practice.

BALCH v. SYMES.

1822: 4th November. 1823: 6th and 7th February.

A solicitor has no lien upon the will of his client, and cannot refuse to produce a deed executed by the client in his favor, containing a reservation of a life interest, and a power of revocation.

Where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and the defendant cannot resist the production upon the ground of lien.

In a suit instituted against a solicitor, who had also acted in the capacity of steward, for an account and for delivery of title deeds, the court upon motion ordered the deeds to be delivered up to the plaintiff, upon payment into court of so much of the balance claimed by the answer as was not covered by any security.

Where a client executes a deed in favor of a solicitor, reserving a life interest and a power of revocation, it is the duty of the solicitor to leave a counterpart of the deed in the hands of the client.

Solicitor's lien is superseded by taking a security.

1823.—*Balch v. Symes*.

IN the month of January, 1814, the plaintiff employed the defendant as her steward, for the purpose of receiving her rents, and superintending and managing her estates. The defendant continued in the service of the plaintiff till the month of April, 1822, and during the period of his employment as steward, he also transacted the plaintiff's pecuniary business, received and paid money on her account, and acted as her solicitor and confidential agent in all her affairs.

The bill stated, that the defendant had got into his possession all the title deeds relating to the plaintiff's estates, that he had taken advantage of the confidence reposed in him, and had fraudulently and improperly induced the plaintiff to make a will, containing a disposition in his favor, and to execute a deed, by which part of her estates were conveyed to him : that he retained the will and deed in his possession, and had procured from the plaintiff certain bonds for securing sums which he alleged to be due *to him, and after charging that at the [*68] time when the said bonds were executed, the accounts of the receipts and payments of the defendant on account of the plaintiff had not been audited, and that the sums mentioned in the bonds were not due from the plaintiff, the bill prayed that the defendant might be decreed to deliver up to the plaintiff the title deeds relating to her estates ; that an account might be taken of the rents and other sums of money received by the defendant on account of the plaintiff ; and that the said will and deed might be declared to have been improperly and fraudulently obtained, and might be delivered up to be cancelled.

The defendant, by his answer, stated that upon the balance of his receipts and payments he had generally been in advance to the plaintiff, during the period of his employment by her, and that he had on several occasions delivered to the plaintiff statements of his receipts and payments on her account, upon the settlement of which, the plaintiff had acknowledged the balance to be in his favor, and had executed bonds to secure the amount which was found to be due from her. The answer then set forth

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the bonds executed by the plaintiff to the defendant upon the settlement of accounts. One of such bonds, dated the 11th of January, 1815, secured to the defendant, in addition to the money alleged to be due to him at the time of its execution on the balance of his accounts with the plaintiff, a further sum, also alleged to be due to him from the plaintiff's late brother, and with which it was stated by the answer that the plaintiff had consented to be charged. Another of such bonds, dated the 21st May, 1817, secured to the defendant the money alleged to have become due to him since the settlement of his last account with the plaintiff, and also his costs as the plaintiff's solicitor up to that time; and the other of such bonds, dated the 1st of January, 1818, secured to the defendant the money alleged to have become due to him since the settlement of his account with [*89] the plaintiff on the 21st of May, 1817, and also a sum of 2,000*l.* by way of gift or reward for his services to the plaintiff and her family. The answer also stated that the sum of 356*l.* 14*s.* 1*d.*, or thereabout, had become due to the defendant from the plaintiff on the balance of the account since the last settlement; and it further appeared by the answer that the plaintiff had on the 21st of May, 1817, executed a deed, by which she released the defendant from all demands up to that time, and that she had secured to the defendant by a bond and promissory note the payment of a sum, which it was alleged that he had advanced to another person upon her credit. The answer, after after further stating that the plaintiff was a single woman, advanced in years, without any near relations, and that in the month of June, 1819, being desirous to make a settlement of her property, and being undetermined in what manner to dispose of it, she consulted the defendant on the subject, and that the defendant then named to her several persons to whom she was most nearly related, but that she did not approve of the persons so named to her, and suggested that she might as well give her property to the defendant, as to any other person, went on to state, that on the 13th of August, 1819, the plaintiff duly executed certain indentures of lease and release, by one of which indentures of release she conveyed to the defendant an estate, called

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the Farm Estate, and certain other property, in trust for herself for life, and after her death, in trust for the defendant, with a proviso enabling her to revoke the indenture by deed or will; and by the other of which indentures of release, she conveyed her other property to the uses therein mentioned: after referring to these indentures in the usual manner, the answer further stated, that in consequence of the plaintiff not having then determined to whom she should give the property comprised in the second mentioned indenture of release, the names were not inserted in that indenture at the time of its execution, and that afterwards, on the 6th of December, 1819, the plaintiff having fixed upon the person *to whom she would give [*90] the said last-mentioned property, directed the defendant to get new deeds drawn for the purpose of conveying the same to her own use for life, and subject thereto, and to the payment of her funeral and testamentary expenses, debts and legacies, to the use of the person so fixed upon by her, and at the same time instructed the defendant to have her will prepared, under which it appeared that the defendant was residuary legatee; and after stating, that the said last-mentioned deeds and the said will were accordingly prepared, and were executed by the plaintiff on the 14th of January, 1820, and that the same were retained by her in her own custody until the 5th of December, 1821, when she delivered them to the defendant, for the purpose of being shown to a person who was expected to lend her money on being satisfied that she had made a provision for the payment of her debts; and further stating, that all the said deeds and the said will were conformable to the instructions of the plaintiff, and to her wishes with regard to the disposition of her property after her death, and that they were read over and explained to the plaintiff previous to the execution thereof; the defendant stated that he had for forty years been employed by the plaintiff and by other members of her family, and that he had on several occasions rendered to them many important services; and after admitting that he was in the possession of the will of the plaintiff, of the said several deeds, and of a great number of other deeds and writings belonging to the plaintiff, and that he had got the same

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into his possession in the course of exercising the office of steward for the plaintiff, and otherwise acting as her agent, the defendant submitted, that he was entitled to a lien on the same, for securing the payment of what was due to him from the plaintiff, and that he ought not to be called upon to part with the possession thereof till such payment was made.

A motion was made by the plaintiff, that the defendant [*91] might forthwith produce and leave in the hands of his clerk in court for the purpose of inspection, the several deeds stated to have been executed on the 13th of August, 1819, and the 14th of January, 1820, together with the will of the plaintiff, and the other deeds belonging to her, which were admitted by the defendant to be in his possession.

Mr. *Hart*, Mr. *Shadwell* and Mr. *Swanston*, in support of the motion, contended that the lien of the defendant could not be affected by the production required, and that the acceptance of securities superseded the lien, *Cowell v. Simpson*.(a) That the deeds were by reference incorporated into the answer, and that where it is the object of a suit to impeach a deed, the defendant cannot refuse to produce it, *Beckford v. Wildman*.(b)

Mr. *Heald* and Mr. *Bickersteth* for the defendant, consented to the production of the will; and of the deeds stated in the answer to have been executed by the plaintiff in August, 1819, and January 1820: but resisted the production of the other deeds, on the ground that the balance which had become due to the defendant since the last settlement of accounts, was not covered by any security, and that he had therefore a lien in respect of it.

THE LORD CHANCELLOR:—It is no uncommon thing to reflect upon persons who have framed deeds and wills in their own favor, but although it seems to me that the framing of such instruments is a transaction in which gentlemen ought

(a) 16 Ves. 275.

(b) *Ibid*, 438.

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not to employ themselves, I by no means concur in the [*92] opinion of Mr. Justice *Buller*, who in a case from Winchester considered that circumstance as almost decisive evidence of fraud.(a) The nature of the transaction depends upon the circumstances of the case, and clearly admits of explanation. Where a person executes a deed in favor of her solicitor, and reserves to herself a life interest and a power of revocation, it is quite impossible for the solicitor to refuse to produce the deed; it is his duty to leave a counterpart of it in the hands of his client. In such a case no consent can be required, and I will not establish such a doctrine as that consent is necessary; so with respect to a will, an instrument which may be altered even *in articulo mortis*, and on which a solicitor can have no lien.(b)

Notwithstanding the Court of King's Bench has expressed a doubt, whether my decision was right in the case of *Cowell v. Simpson*, I still entertain the opinion, that an attorney who takes a security abandons his lien. That doctrine, however, will not apply to sums which are not covered by the security, and as to those sums, therefore, the lien must be considered to remain. There is a peculiar circumstance in this case which was adverted to in argument, that some of the deeds were delivered to the defendant for the purpose of showing to some person that the plaintiff had made a provision for her debts; now although where deeds are delivered for the purpose of conducting a suit, the general lien must prevail, yet where they are delivered for a specific purpose, beyond that purpose there can be no lien. Where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and no lien can protect the defendant from producing it, for it is the object of the suit that the deed may be declared a nullity. A considerable question however may arise at what period of the cause the production can be compelled.

*The order was made for the delivery to the plaintiff [*98] personally, or to her clerk in court, at the option of the

(a) *Paine v. Hall*, 18 Ves. 475.

(b) *Georges v. Georges*, 18 Ves. 294.

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defendant, of the plaintiff's will, and of the deeds executed in August, 1819, and January, 1820, with liberty to the plaintiff to mention the motion again as to the other deeds on the question of lien.

February 7th.—A motion was now made by the plaintiff, that she might be at liberty to pay into court the sum of 356*l.* 14*s.* 1*d.*, the balance alleged by the defendant in his answer to be due from her, over and beyond the sums secured by the bonds in the answer mentioned, and that upon such payment being made, the defendant might be ordered within ten days to deliver upon oath to the plaintiff, or such person as she should appoint, all the title deeds, court rolls, monuments, maps, plans, letters, accounts, papers and writings, delivered to the defendant by the plaintiff, or belonging to the plaintiff, in the custody or power of the defendant.

After the notice of motion was given, the defendant delivered a further bill of costs as the solicitor of the plaintiff, amounting to the sum of 1,250*l.*

Mr. *Hart*, Mr. *Shadwell* and Mr. *Swanston* for the motion: The doctrine laid down in *Cowell v. Simpson* was doubted by the Court of King's Bench in *Stevenson v. Blakelock*:(a) but in a subsequent case of *Chase v. Westmore*(b) your Lordship's decision was acquiesced in. Since the notice of motion was given, the defendant has advanced a further claim: but he is bound by his answer, and cannot now be permitted to avail himself of [*94] that *claim. Admitting however that he can bring forward the claim, he has no lien upon the deeds: he obtained possession of them in the character of steward, and he can have no lien upon them for what is due to him in any other character, *Chambernawn v. Scott*.(c)

(a) 1 Maul. and Selw. 535.

(c) 6 Madd. Rep. 93

(b) 5 Maul and Selw. 180.

1823.—*Verlander v. Codd.*

Mr. *Heald* and Mr. *Bickersteth* against the motion.

THE LORD CHANCELLOR made the order.

VERLANDER *v.* CODD.

1823: 18th February.

Where the plaintiff is misnamed in an order to dismiss a bill for want of prosecution, in consequence of an error in the six clerks' certificate, a replication filed after service of the order will not be irregular. *Semble.*

IN this case the defendant having put in his answer, and no further proceedings having been taken by the plaintiff, an order was obtained to dismiss the bill for want of prosecution. In the six clerks' certificate produced to the registrar, the plaintiff, whose real name was Jacob Alexander Verlander, was misnamed Daniel Verlander, and in consequence of that mistake, the order to dismiss the bill was drawn up and served in the name of Daniel Verlander; after service of the order the plaintiff filed a replication. A motion that the replication might be taken off the file for irregularity, having been made before the Vice-Chancellor and refused, (a) the same motion was now made before the Lord Chancellor.

Mr. *Horne* and Mr. *Bligh*, in support of the motion, contended, that as the order operated from the time *it [*95] was pronounced, no subsequent clerical error in drawing it up could destroy its effect, *Lorimer v. Lorimer.* (b)

Mr. *Wakefield* against the motion, insisted that slight errors of this kind were sufficient to vitiate proceedings, and referred to the cases of *Bingham v. Dickie*, (c) *Ex parte Ward*, (d) *Ex parte Schofield*. (e)

(a) 1 Sim. and Stew. 94

(d) 1 Rose, 314.

(b) 1 Jac. and Walk. 28a.

(e) 2 Rose, 246.

(c) 5 Taunt. 314.

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THE LORD CHANCELLOR:—The misnomers in the cases referred to were of very serious consequence. In the first, which was an error in the description of plaintiffs in a bail-piece, the bail bond was put in force against the bail; and with respect to the other two cases, which are cases in bankruptcy, it must be remembered that the bankrupt, not having surrendered himself, would have been guilty of felony without benefit of clergy.^(a) In this case there is no room for any argument, as there might be in the case of bankruptcy, from what would have been the effect if subsequent proceedings had been had. If a bankrupt, notwithstanding the misnomer, has submitted to the commission, he could not in any subsequent proceeding be allowed to dispute it: but here the very act of filing the replication is an act of non-submission; the cases cited, therefore, are not similar to the present, and we must see how this motion stands upon principle. According to the old practice, upon a motion to dismiss the bill for want of prosecution, it was necessary to bring into court the certificate of the six clerk; and I take it to be quite clear, that if the six clerks' certificate was produced in a cause [96] in which Daniel Verlander was *plaintiff, upon a motion to dismiss a bill where the plaintiff's name was Jacob Alexander Verlander, the court would not have granted the order: if then the court, according to the modern practice, so far indulges the party, as to give him credit that he is entitled to have the certificate, and makes the order operative from the time of pronouncing it, leaving the party to produce the certificate to the registrar, the question is, whether the party does not stand in the same situation, if he takes the certificate full of mistakes, as he would have done, if according to the old practice he had had the certificate in court to produce at the time when the motion was made. I cannot help saying that there is more reason in the refusal of the Vice-Chancellor than I was at first disposed to think.

Upon this intimation of the Lord Chancellor's opinion, the

(a) Stat. 5 Geo. II. c. 30, s. 1 and 2.

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counsel for the plaintiff did not press the motion further, and it was agreed that the replication should stand, each party paying his own costs.

PANNELL v. TAYLER.

1823: 28th January; 5th, 11th and 20th February.

A writ of *ne exeat regno* against a *feme covert* administratrix cannot be sustained.

Where a writ of *ne exeat regno* issues for a larger sum than is due, the court will make an order that so much only shall be raised as is due, without quashing the writ.

Where the writ issues against an executor at the instance of a legatee, it must be marked for the whole amount of what is due, not only to the plaintiff, but to other persons.

Feme covert holding herself out in the character of a *feme sole* may be arrested, and courts of law will not discharge her upon motion.

In cases of *ne exeat regno* a court of equity proceeds by analogy to the proceedings at law in cases of legal bail.

THE bill in this cause was filed by three of the children of John Herlock, who died intestate, against his other surviving children, and his widow and her second husband. The bill stated, that the intestate died on the 1st of December 1808, leaving his widow and nine children; that the widow obtained letters of administration of the personal estate and effects of the intestate, and afterwards intermarried with the defendant Thomas Tayler; and that previously to, or shortly after her marriage, she ascertained the clear residue of the intestate's personal *estate, and having retained one-third part thereof [*97] for her own use, apportioned the remaining two-thirds parts into nine equal shares, each of which amounted to the sum of 300*l.* 3*s.* 10*d.*

The bill then stated, that several of the children of the intestate had been paid their respective shares, but that the other shares, including what was due to the plaintiffs, and amounting in the whole to the sum of 1,500*l.* 19*s.* 2*d.* still remained in the

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hands of the said Thomas Tayler and Jane his wife; and after further stating, that by the death of one of the children whose share was unpaid, the said Jane Tayler had become entitled to her distributive share of that part of the 1,500*l.* 19*s.* 2*d.* which belonged to the child so dying, and that the said Thomas Tayler was gone to reside abroad, and the said Jane Tayler was about to leave the country; the bill prayed, that the sums ascertained to be due to the plaintiffs might be paid to them, or that the usual accounts might be taken of the personal estate and effects of the intestate, and that the writ of *ne exeat regno* might issue to restrain the said Jane Tayler from departing from or leaving England. The facts stated in the bill were verified by affidavits filed with it.

Mr. Barber moved for the writ in the Lord Chancellor's private room; and after several applications, his Lordship, having been referred to the cases of *Moore v. Meynell*(*a*) and *Jernegan v. Glasse*,(*b*) considered himself bound by *authority, and directed the writ to issue, and to be marked in the sum of 1,500*l.* 19*s.* 2*d.*

(*a*) 1 Dick. 30.

(*b*) 1 Dick. 107; 3 Atk. 409. Ambl. 62. See the extract from the register which is subjoined.

FRANCIS JERNEGAN and others, Plaintiffs. EDWARD ASHE PERKINS, RICHARD ACTON, ALEXANDER GLASSE, and FRANCES his wife, Defendants.
(24th January, 1746.)

Upon opening of the matter this present day unto the Right Honorable the Lord High Chancellor of Great Britain, by Mr. Newnan, being of counsel with the plaintiffs, it was alleged that the defendant Frances Glasse, now the wife of the defendant Alexander Glasse, and late the widow and executrix of Henry Jernegan the plaintiff's father deceased, hath possessed herself of all the goods and effects of the said Henry Jernegan, and hath withdrawn herself from her late habitation, without giving any account of her said late husband's effects, or paying the plaintiffs what is due to them for their portions and maintenances. That the said Alexander Glasse is now actually gone beyond the seas with some part of the effects late of the said Henry Jernegan deceased, and the said defendant Frances his wife, hath threatened and given out, that she will speedily leave the kingdom and go beyond the seas to her said husband, whereby the plaintiffs will either lose their several debts, or the same will be very much endangered, and it will be difficult for them to recover their

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A motion was now made on behalf of Mrs. Tayler, who had not entered an appearance, to discharge the writ.

Jan. 28th.—*Mr. Agar and Mr. Duckworth in support of [*99] the motion :—The circumstances of the cases upon the authority of which this writ has been issued are peculiar. In *Jernegan v. Glasse*, Lord Hardwicke acted upon the precedent of *Moore v. Meynell*: but that latter case proceeded upon the principle, that the feme covert administratrix had acted as a feme sole by appearing to the suit, her husband being out of the jurisdiction. It is an established principle that the writ of *ne exeat regno* cannot be granted in cases, where, if the demand was a legal demand, the party could not be held to bail at law. If an action could have been maintained in this case, it is clear that the feme covert could not have been held to bail. Another objection is, that this writ is marked for the whole amount of the personal estate in the hands of the defendant, to part of which she is herself entitled. If the plaintiffs could have proceeded at law, they could have sued only for their respective shares, they cannot hold the defendant to equitable bail beyond that amount. After the writ has passed the Great Seal, the court cannot vary it; the indorsement therefore being wrong, the writ must be quashed.

demands; that there is now justly due to the plaintiff Nicholas Jernegan, from the estate of his said father deceased, the sum of 634*l.* 13*s.*, and to the other plaintiffs the sum of 1,200*l.* and upwards, as the said plaintiff Nicholas computes the same. That the said defendant Frances Glasse, did some time in September last declare, in the said plaintiff Nicholas Jernegan's presence, that the said plaintiff Nicholas, and the rest of the creditors of the said Henry Jernegan deceased, might make themselves very easy, for that the said Henry Jernegan had left effects sufficient to pay all his debts; as by the affidavit of the said plaintiff Nicholas Jernegan now produced and read appears; to be relieved wherein the plaintiffs have exhibited their bill in this court against the defendants, as by the six clerk's certificate, dated the 17th inst., appears. It was therefore prayed, that a writ of *ne exeat regno* may be awarded against the said defendant Frances Glasse, until she shall have fully answered the plaintiff's bill, and this court make other order to the contrary, which is ordered accordingly; and the said writ is to be marked in the sum of one thousand eight hundred pounds in words at length and not in figures. [Reg. lib. A. 1746, fol. 155.]

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Mr. *Hart* and Mr. *Barber* for the plaintiffs: Upon the first point, that the writ may issue against a feme covert executrix, the authorities are uniformly in our favor; and in *Jernegan v. Glasse* the defendant had not appeared. There are many cases in which a feme covert may be taken up upon the process of the court; *Dubois v. Hole*.^(a) The court cannot preserve the property of the plaintiffs without securing the whole amount of the personal estate; for if the shares of the plaintiffs only are [*100] brought into court, the other parties interested *in the estate will be entitled to a proportion of the fund.

THE LORD CHANCELLOR:—Where the writ issues for a larger sum than is really due, there is no doubt that the court will make an order, that so much only shall be raised as is really due, without quashing the writ, and that too where the motion is in terms to quash it: but here if the writ can be supported at all, it must be indorsed for the whole amount of what is due, not only to the plaintiffs, but to other persons; for if one of several legatees, being entitled to 100*l.*, gets that 100*l.* into court, he cannot get it out again whilst the other legatees remain unsatisfied, because he sues on behalf of himself and all the other legatees, and is only entitled to a proportion of the sum deposited. There was this difference between law and equity, so long as the practice of bringing actions at law for legacies existed, that a legatee if he recovered at all at law, recovered the whole amount of his legacy: but in equity he is entitled to a proportion only till all the legacies are satisfied.

The law as it now stands with regard to coverture, differs materially from the old law. The modern practice is, that if a feme covert holds herself out to the world in the character of a feme sole, she may be arrested; and the courts of law will not discharge her upon motion, but will put her to her plea of coverture, and to proof of that plea. But the old law seems to have considered it impossible that she should separate herself from

(a) 2 Vern. 613, and see the cases cited in the note.

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her husband, unless he abjured the realm or was transported. Mr. Justice *Buller* indeed held, that there might be cases in which a married woman might be treated as a feme sole to all intents and purposes, and that was held to be law for twenty years: but when it came into the Exchequer Chamber, it was overruled. I contributed to make Mr. Justice *Buller* alter his mind on this point, by asking him what he [*101] meant by the expression "to all intents and purposes." Could a married woman be a witness against her husband? In cases of felony jointly committed by her and her husband, could she be treated as a feme sole? Then as to a deed of separation having the effect of making her liable as a feme sole—where was it laid down that a feme covert could execute a deed?

I cannot think that Lord Cowper, Lord Macclesfield, a great common lawyer, and Lord Hardwicke, a still greater common lawyer, would have granted this writ against a feme covert executrix, without being satisfied with the principle upon which it was granted. What that principle was, I cannot find out: but they might see analogies which I am unable to discover. It is clear that in one of the cases the party had not appeared.

February 5th.—THE LORD CHANCELLOR:—In that case of *Moore v. Meynell* it seems as if the husband appeared at the hearing; and instead of the decree being against him and his wife, as a judgment at law would have been, it is against him alone, and she goes free. Could the court have made that decree if the husband had not appeared? This case must be argued again.

February 11th.—The motion now came on for further argument.

Mr. *Agar* and Mr. *Duckworth* in support of the motion:—It appears by the decree in *Moore v. Meynell* that that case has very little analogy to the present: the feme covert there had large separate property; she had executed bonds, and it seems

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[*102] *to have been contended, that she had rendered her separate estate liable to the payment of the debt. If the court maintains the writ against this feme covert—what decree can be made at the hearing? The decree must be against the husband; and he is not before the court. Where husband and wife are arrested at law upon mesne process, the husband must put in bail for both; and the wife, when arrested without her husband, is entitled to be discharged upon putting in common bail. *Edwards v. Rouke and Wife*, (a) *Crookes v. Fry and Wife*, (b) *Wilson and Serres*. (c) It is now the practice to discharge the wife when taken in execution as well as on mesne process (d) so that there is no case in which a feme covert can at common law be kept in custody. If upon a legal demand the courts of law will not permit a feme covert to be arrested, courts of equity will not upon an equitable demand exercise this prerogative writ against her.

Mr. Hart and Mr. Barber for the plaintiffs:—There may be some difficulty in discovering the principle upon which this writ issues against a feme covert: but the practice has continued for a century, and the question is set at rest by the authorities. The writ has regularly issued; and the defendant, before she applies to be discharged, must show that she is willing to satisfy whatever the justice of the case requires. The court can do no act in her favor till she has put in her answer; the discovery furnished by the answer may pave the way for the appointment of a receiver, and may enable us to render the property of the husband amenable. The case of *Moore v. Meynell* is precisely in point.

[*103] *THE LORD CHANCELLOR:—The strong inclination of my opinion now is, that I cannot maintain this writ. No instance has been produced to me of such a writ having been granted since the year 1746, a period of nearly eighty years;

(a) 1 T. R. 486.

(b) 1 B. & A. 165.

(c) 3 Taunt. Rep. 307.

(d) Tidd's Pract. 7th edition, 220, 1043.

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and in that case in *Ambler*,^(a) Lord Hardwicke seems to have been quite as much startled as I was, when this application was first made to me.

It has always been understood, that a court of equity in cases of *ne exeat regno* proceeds in some respects by analogy to the proceedings at law in cases of legal bail. There is no case in which you can hold a party to bail in equity, where you might hold him to bail at law, except on the balance of an account:^(b) but in other cases the general rule is, that in an equitable case you cannot hold a party to equitable bail, where in a legal case you could not compel him to give effectual legal bail. I leave now out of my consideration all the cases in which a married woman has separate property, because in those cases the court knows how to deal with her. But where she is merely administratrix, it is clear that she has no power to act without her husband.

February 20th.—Upon the best consideration which I have been able to give this case, I have come to the conclusion, that had I been apprized of the circumstances of the case of *Moore v. Meynell*, I should not have granted this writ, and that the writ must therefore be discharged. There may be a very great difference between the case of a married woman who has separate property, and the case of a married woman who is administratrix, and as administratrix can have no separate property at all.

**LEWIS v. LEWELLYN.*

[*104]

ROLLS.—1823: 20th February.

A testator having a power of appointment over certain freehold and copyhold estates, and being seised of other freehold estates, devises all his freehold and

(a) *Jernegan v. Glasse*, ante, 97, 98.

(b) See *Flack v. Holme*, 1 Jac. & W. 405.

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copyhold estates, without reference to the power: Held an execution of the power as to the copyhold estates, but not as to the freehold estates which were subject to the power.

BEFORE *Best*, Justice, and *Masters Courtney* and *Dowdeswell*, for the *Master of the Rolls*.

BY indenture of settlement, dated the third of January, 1809, and made previous to the marriage of Morgan Lewellyn and Margaret Williams, certain freehold and copyhold estates were limited, to the use of the said Morgan Lewellyn for life, with remainder to the use of the said Margaret Williams, afterwards Margaret Lewellyn for life, with remainder to the use of such person or persons, and for such estate and estates, and for such trusts, intents and purposes, and charged and chargeable in such manner and form, as the said Morgan Lewellyn, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be sealed and delivered by him in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, or any writing in the nature of a will, or any codicil or codicils, to be by him signed, sealed and published in the presence of and to be attested by three or more credible witnesses, should direct, limit or appoint; and in default of appointment, to the uses therein mentioned.

The said Morgan Lewellyn by his will, dated the 2d of February, 1814, duly executed and attested, so as to pass freehold estates, directed that all his just debts, as well by specialty as by simple contract, funeral and testamentary expenses, should be paid as soon as conveniently might be after his decease, and charged all his freehold, copyhold and leasehold estates [*105] thereafter mentioned with the payment *thereof; and subject thereto, he devised and bequeathed all his real and personal estates to his brother Charles Lewellyn, one of the defendants, his heirs, executors, administrators and assigns, according to the nature of the property respectively, and appointed the said Charles Lewellyn sole executor of his will.

The testator had no other copyhold estates except those which

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were comprised in the settlement, but he had other freehold estates.

After the death of the testator, the bill was filed by his creditors, praying that the usual accounts might be taken of the personal estate, and that it might be declared that the will operated as an appointment of the freehold and copyhold estates comprized in the indenture of settlement; and that the whole, or a sufficient part thereof, might be sold to pay the testator's debts in aid of his personal estate.

The defendant Morgan Lewellyn, who claimed through the person entitled under the settlement in default of appointment, by his answer claimed such interest in the settled estates, as the court might consider him entitled to.

Mr. *Shadwell* and Mr. *Bickersteth* for the plaintiffs:—We admit that there can be no question as to the freehold estates: but the testator not having had any other copyhold estates than those comprised in the settlement, the words of the will must, as to the copyhold estates, be considered as an execution of the power, since otherwise they would be wholly inoperative, *Standen v. Standen*.(a) The distinction is clearly settled, that in the appointment *of personal estate by will, there must be some [*106] reference to the power, because every person is possessed of some personal property, and the court will not inquire into the *quantum*: but in the case of real estate, the court will resort to the power, although the devise be general, if it finds that there is no property to satisfy the will, except what is subject to the power.(b)

Mr. *Sugden* and Mr. *Knight* for Morgan Lewellyn:—The court cannot make the words of the will operate in two different ways: the same words cannot operate as an appointment of the copyhold, but as a general devise only of the freehold estates. Nothing is so common as for persons to include copyholds in

(a) 2 Ves. J. 589.

(a) *Bennett v. Auburrow*, 8 Ves. 609; *Jones v. Currie*, 1 Swanst. 66.

1823.—Cholmondeley v. Clinton.

their wills, when they have none, because subsequently acquired copyholds will pass by a will without a republication.

Best, Justice:—The question in this case is, whether the clause cannot be divided, and considered as operating in one sense with respect to the copyhold, and in another with respect to the freehold. If it can, and the case of *Standen v. Standen* is rightly decided, I think it applies strictly to this case.

The will does not refer to the power; but the question is whether it does not refer to the estate. It refers to the estate in clear and unequivocal terms; and as the rule is, that all the words of a will should, if possible, have effect, and these words with respect to copyhold cannot be satisfied by anything short of considering them an execution of the power, *ut res magis valeat quam pereat*, they should be so construed. That is the general principle of *Standen v. Standen*; and we must look [*107] only to the general principle, *for it is impossible to find two cases precisely alike. The general reasoning in some points of Lord Rosslyn's judgment may have been repudiated: but the principle remains unshaken. The principle is, that where there is nothing for the will to operate upon, but with reference to the power, it must operate as an execution of the power.

For these reasons I am of opinion that the will is an execution of the power as to the copyholds.

CHOLMONDELEY v. CLINTON.

1822: 25th and 26th November; 7th December. 1823: 22d February.

An estate being in lease, A. enters and receives the rents during the continuance of the lease, and afterwards continues in possession, up to a period more than twenty years distant from the time of his entry. Within twenty years after the expira-

 1823.—*Cholmondeley v. Clinton*.

tion of the lease, B. brings an ejectment, and files a bill for discovery; though the ejectment might be maintained at law, a demurrer to the discovery is good. Where there has been adverse possession, not accounted for by some disability, as coverture or infancy for twenty years, a court of equity ought not to interfere. Two persons averring that the title is in one or the other of them, and each contending that it is in himself, cannot join in a suit as co-plaintiffs. *Semble*.

THE bill in this case was filed in Trinity Term, 1813, for a discovery in aid of an action of ejectment, brought upon the joint and several demises of Lord Cholmondeley and Mrs. Damer, and upon the demise of certain other persons, with respect to whom it was stated, that doubts had arisen whether they were seised of the legal interest in the estates in question, under a codicil to the will of George, Earl of Orford. The bill stated, that Roger Tuckfield being seised in fee simple of a moiety of the manor and borough of Ashburton, did by indentures of lease and release dated the 26th and 27th of April, 1706, convey the same, together with other hereditaments, to the *use of himself for life, with remainder to the use of the [*108] heirs of his body, with remainder to the use of his sister Margaret, the wife of Samuel Rolle, for ninety-nine years if she should so long live, with remainder to the use of trustees during the life of the said Margaret Rolle, with remainder to the use of the first and other sons of the said Margaret Rolle successively in tail male, with remainder to the use of her issue female, with remainder to the use of his own right heirs forever. That the said Roger Tuckfield died intestate and without issue, leaving the said Margaret Rolle his sister and heir at law. That the said Margaret Rolle the elder had issue, a daughter, Margaret Rolle the younger, who intermarried with Robert Walpole, afterwards Earl of Orford, and by him had issue a son, George, afterwards Lord Walpole and Earl of Orford; and that by a deed poll dated the 2d of April, 1750, the said Margaret Rolle the elder, limited the remainder in fee of the said moiety of the said manor and borough of Ashburton, to the use of the said George, Lord Walpole for life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of the first and other sons and first and other daughters of the said

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George, Lord Walpole successively in tail general, with remainder to the use of the said George, Lord Walpole his heirs and assigns forever. And after further stating, that the said Margaret Rolle the elder died in 1754, leaving Margaret Rolle the younger, then Countess of Orford, her only child and heir at law; and that Margaret, Countess of Orford died in 1781; and that upon her death, the said George, then Lord Walpole became, as the plaintiffs were advised, seised of the aforesaid estate at Ashburton by purchase as tenant in fee simple in possession, subject to the contingency of his having issue, under and by virtue of the limitations contained in the said deed poll of the 2d of April, 1750; the bill went on to state, that the said George, Lord Walpole, then Earl of Orford, did not by his will dispose of or [*109] affect the said estate at Ashburton, *and that by a codicil to his will, dated the 4th of December, 1776, after reciting that he had by his will devised all his real estates to certain uses, but had not charged the same with the payment of his debts or legacies, he revoked his said will so far as the same was incompatible with his said codicil, and subjected all his real and personal estate whatsoever and wheresoever to the payment of all his just debts, and the legacies thereafter mentioned, and funeral expenses; and for effectuating the payment thereof, he gave, devised and bequeathed all his said real and personal estates to be sold, and directed and empowered his trustees therein named, or the survivors or survivor of them, his heirs, executors or administrators, as soon as conveniently might be after his death, to sell and dispose of the same for the payment of his debts, legacies and funeral expenses; and appointed the trustees therein named to be the executors of his will.

The bill then stated, that George, Earl of Orford, died on the 5th of December, 1791, without issue, leaving Horatio, Earl of Orford his uncle and heir at law, and several of the trustees named in his will surviving; and that upon his death, Robert George William Trefusis, afterwards Lord Clinton, who was his next cousin and heir *ex parte materna*, wrongfully entered into the receipt of the rents and profits of the said moiety of the said

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manor and borough of Ashburton, and that he continued in such receipt until the time of his death; and that upon his death, on the 28th of August, 1797, the defendant Lord Clinton, who was his eldest son and heir at law, entered into the receipt of the rents and profits of the same estate at Ashburton, and that he then was in such receipt, or in the possession of the said estate. The bill next stated, that Horatio, Earl of Orford, by his will, dated the 15th of May, 1793, after disposing of his freehold and leasehold estates in the counties of Norfolk, Essex and Middlesex, and giving divers specific and pecuniary legacies, gave, devised *and bequeathed to his cousin Henry Seymour [*110] Conway, his heirs, executors and administrators, all the rest and residue of his estate and effects real and personal, of which he then was, or should be at his death seised, possessed, interested in or entitled to, or over which he had a disposing power; and that the said Henry Seymour Conway having died in the lifetime of the testator, he, by a codicil to his will, dated the 27th of December, 1796, appointed the plaintiff Ann Seymour Damer to be his residuary legatee and devisee in the room of the said Henry Seymour Conway; and after further stating, that Horatio, Earl of Orford died soon after the date of his codicil without issue, leaving the plaintiff Marquis Cholmondeley his heir at law, and the plaintiff Ann Seymour Damer him surviving; and that some questions had arisen between the said plaintiffs respecting the will and codicils of the said Horatio, Earl of Orford, and that they had agreed to share equally between them the residue of his real estate; and that they were advised that under and by virtue of the aforesaid conveyances and assurances, and particularly the limitations contained in the said deed poll of the 2d of April, 1750, *they or one of them*, upon the death of the said Horatio Earl of Orford, became beneficially entitled to the said moiety of the said manor and borough of Ashburton; the bill stated, that at the death of the said George Earl of Orford, the said moiety of the said manor and borough was let upon leases for lives, and upon leases for years simply, and for years determinable upon lives, which leases respectively did not expire till long after the year 1796.

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The bill further stated, that the plaintiffs had lately brought several actions of ejectment to recover possession of the said estate at Ashburton; and that doubts having been suggested, whether the legal interest therein was not vested in the surviving trustees named in the said codicil of the said George Earl of Orford, the said actions were brought upon the joint [*111] and several demises of the said *plaintiffs, and upon the demise of the said surviving trustees, with their consent and approbation; and after alleging, that the plaintiffs were advised, that if the legal estate in the said moiety of the said manor and borough passed by the said codicil of the said George Earl of Orford to the said surviving trustees, the same was then vested in them in trust for the said plaintiffs *or one of them*; and that Lord Clinton had caused himself to be named defendant to the said action of ejectment; the bill called for a discovery of the several matters aforesaid.

To this bill the defendant Lord Clinton filed a general demurrer, that the plaintiffs had not by their bill shown any right or title to the discovery sought thereby. The demurrer was heard before the Vice-Chancellor on the 19th and 22d days of December, 1818, and his Honor was pleased to overrule it. From the order overruling the demurrer Lord Clinton appealed.

Mr. *Heald*, Mr. *Pepys*, and Mr. *Seymour*, in support of the demurrer:—There are two grounds on which this demurrer ought to be allowed: First. That the title of the plaintiffs is alleged to rest upon an agreement which the law will not sanction. Secondly. That two plaintiffs cannot come into this court stating titles which cannot possibly subsist together. With respect to the illegality of the agreement; it is not necessary to enter at large into the law upon that subject. The point was fully considered in the late case between these parties in the House of Lords, and the opinion expressed on that occasion is quite conclusive in our favor. Suppose Lord Cholmondeley had filed the bill alone, alleging the devise to Mrs. Damer, and that he had agreed with Mrs. Damer for her interest in the property—could

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the bill have been supported? It would have been precisely the case against which the statute 32 H. 8, c. 9 was intended to *guard, the purchase by one party out of [*112] possession, of the title of another person also out of possession. If the illegality of the agreement is not decisive in favor of the demurrer, still the plaintiffs cannot be permitted to set up conflicting titles; the grounds of defence against the heir at law and the devisee are perfectly different. If the bill was filed by the devisee, the length of time would be a clear answer to her claim. If the heir at law set up a title, we could show that the estates passed by the codicil: but when the heir at law and devisee claim together, there is no mode of pleading by which we can raise our defence against them. We cannot put in two pleas against two independent and different claims. Admitting that where a person has been out of possession for twenty years he may in some cases bring an action of ejectment, a court of equity will not favor the action; it is bound by the Statute of Limitations, and will give no assistance to rights which have been slept over for twenty years. On that ground also we contend that this bill cannot be supported.

The *Attorney-General*, Mr. *Shadwell* and Mr. *Sugden* for the plaintiffs:—It has been contended on the other side, that on the face of this bill we show a title that is illegal; a title, in one of the plaintiffs at least, acquired by champerty or maintenance, or by the purchase of a pretended title. Now Lord Coke^(a) thus defines what is champerty, and what maintenance: first, to maintain, to have part of the land or anything out of the land, or part of the debt or other things' in plea or suit, is called *campi partitio* or champerty; next maintenance is, when one maintaineth the one side without having any part of the thing in plea or suit. Champerty and maintenance therefore are, where a person not a party to the record supports the party to the *record, which is not in any sense the case now before [*113] the court. In determining the question whether this is

(a) Co. Litt. 368.

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a purchase of a pretended title, the court must consider, whether an information or an indictment could be maintained on the statute 32 H. 8, c. 9. Upon the facts appearing upon this record, no such indictment could be maintained: it must be shown that the seller has not been in possession a year before, and that he had a pretended right to a title. *The King v. Hill*, (a) *Dyer* 74. The evil against which the statute was intended to guard was this, that one man having no right to an estate, but only a pretended right, and not being able to prosecute his right, should sell such right to another person; but this is the case of two persons, it being doubtful which has the right, joining together in bringing one suit instead of two. When there are questions between two parties relative to rights which they claim under certain instruments, or under wills, it is perfectly competent for them to enter into an agreement respecting those rights, and such an agreement is not only legal, but might be enforced between the contracting parties in this court. *Cann v. Cann*, (b) *Hobson v. Trevor*, (c) *Stapilton v. Stapilton*, (d) *Stockley v. Stockley*. (e) And not only may parties compromise their rights, but it has even been held, that parties may enter into an agreement in contemplation of a right which may afterwards devolve upon them, where neither party had any right at the time when the agreement was entered into. *Beckley v. Newland*. (g) For the purpose of this argument it must be assumed, that a question respecting the title has arisen between these parties, and there is nothing to prevent them from entering into a compromise for the purpose of avoiding litigation. Suppose that these lands were withheld by a tenant, or a mortgagee, and that Lord Cholmon-
[*114] deley and Mrs. Damer came into a court of *law to enforce their rights; it is every day's practice in a court of law, that if an ejectment be brought, and it be doubtful whether the title be in the heir at law or devisee, that they may join in the action by having a demise from each, and you may recover on either as the case may be.

(a) Cro. Car. 233.

(c) 2 P. Wms. 191.

(e) 1 Ves. & Beames, 23.

(b) 1 P. Wms. 723.

(d) 1 Atk. 2.

(g) 2 P. Wms. 182.

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THE LORD CHANCELLOR:—Supposing the agreement to be a lawful agreement, it would be an agreement which would perhaps entitle you in moieties to the legal estate, or to the beneficial interest. Now if you look at the subsequent charges of the bill, after the statement that you have agreed to divide the estate, you go on to allege, not that the beneficial interest is in you according to the agreement, but that it is in you or one of you, and that you or one of you is entitled; Lord Redesdale's opinion, as declared in the House of Lords was, that a bill in equity with such an averment could not be supported. So when you come to the ejectment which proceeds amongst others on the demise of the trustees, the bill alleges not that the beneficial interest is in you, but in you or one of you. According to Lord Redesdale's opinion the allegation ought to have been (provided the agreement is a legal one) that the trustees were trustees for both the plaintiffs, and not for one of them.

For the plaintiffs: It is averred that the parties have agreed to share equally between them the residue of the real estates. Supposing therefore that the agreement is a good and valid agreement, it sufficiently appears that both parties have a joint beneficial interest under it. The objection would have had its full force, if the bill had simply averred that the plaintiffs or one of them had been entitled, and then that the trustees were trustees for them or one of them.

*The existence of the leases saved the right of the [*115] plaintiffs down to the time of their expiration. In *Doe v. Danvers*(a) it was decided, that though a party was out of possession for more than twenty years, yet that the time would not run against him during the continuance of the lease; upon this simple ground, that no man by wrong can get my right, and therefore the payment of the rent to a person not entitled can never operate as a disseisin. If my tenant pays rent to another wrongfully, I am nevertheless in possession, though I do not

(a) 7 East. 299.

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choose to take advantage of the forfeiture, *Doe d. Onell v. Maddox*.(a)

Mr. *Heald* in reply :—The question in this case is, not whether the agreement should be enforced between the parties, but whether it gives such a title as is good against one individual. We rest this case upon the short point, that here are two persons with opposite interests to each other converted into co-plaintiffs; there is no precedent of such a bill being supported. It would lead to this inconvenience, that if A. filed a bill, claiming a right which it was known he had not, and a demurrer was put in upon the ground, that by the statements of the bill it appeared that the title was in B., the bill might be amended, and B. made a co-plaintiff; and although it would appear upon the record that A. and B. had opposite interests, the court would decree the estate to A., which would in effect be declaring that B. had no title at all; so that a party would obtain a decree in his own suit, though by the decree it would appear he had no title to the estate.

THE LORD CHANCELLOR :—The difficulty of maintaining a suit where there are two plaintiffs, A. and B., each as-
 [*116] serting the title to be in him, is *this, that if the court decides that A. is entitled, and the defendants do not complain, how is B. as a co-plaintiff to appeal from that decree, They remove that objection by saying, that although previous to the agreement the titles were in different persons, the agreement has made them tenants in common, and, therefore, that they have but one title between them.

For the defendants: We admit that if a person has a title, and agrees to let another in as tenant in common, they may sue together: but in that case it appears how they are tenants in common; here upon the face of the bill it is uncertain, whether Lord Cholmondeley claims under Mrs. Damer, or Mrs. Damer un-

(a) *Runnington's Eject. App. 458.*

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der Lord Cholmondeley. The present too may be considered as a case, in which we have a right to insist, that the plaintiffs are not entitled to a discovery, because it appears on the face of the proceedings, that we have been in the quiet possession of the property more than twenty years; and because, although the real owner may not be compelled to bring an ejectment before the expiration of the lease, it does not follow that this court will assist him by discovery to bring that ejectment after twenty years have elapsed.

THE LORD CHANCELLOR:—It has been argued that this is a case, in which the plaintiffs come into court, stating, that the one or the other is entitled; and if that is the nature of the record, it is a record quite singular, and quite different from any I ever recollect; that two persons can come into this court, and say the title is either in me or you; each contending it is in himself, and bring before the court a defendant—is this the course of the court? The real question here is whether *the [*117] record does put it in that way or not. It is true that it does put it in that way, so far as it alleges, that one or the other is entitled under a certain instrument: but the question is, whether it goes on to assert, that not only under that instrument, but under the agreement entered into by the parties, one or the other is entitled; or whether it makes the distinction, that one or the other is entitled under the instrument, but that both have acquired an equitable title under the agreement. If that distinction is made, the objection fails; and this is a bill brought upon a distinct title, because it asserts that though it is a legal title in one or the other, it has become subject to equitable claims in which both have a common interest. Another question here is, whether the record states a case that falls within the principle of the great case in the House of Lords. The case of *Doe v. Danvers* is said to differ this case from that; without having formed any opinion upon the case of *Doe v. Danvers*, I can only say, that I know there has been some grumbling as to its authority in the place to which this may go: but supposing that case to be quite right, I am not prepared to say that the sort of possession

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which will support an ejectment, is the kind of possession which will authorize the holding that a bill of discovery will lie.

February 22d.—THE LORD CHANCELLOR:—In this case there are several questions. It is a bill filed for discovery in aid of an action of ejectment, brought on the demise of Lord Cholmondeley, on the demise of Mrs. Damer, upon the joint demise of both, and likewise on the demise of persons represented to be trustees for them of the estate; and the point is, that to this bill, so framed, there is a demurrer, insisting that the plaintiffs on their own showing are not entitled to any discovery in equity. [*118] Many points arise in the consideration of this *case which it is not necessary now to discuss or determine.

First, we had the case argued upon the doctrine of champerty and maintenance, and as to savoring of those offences at the common law: how far equity would act upon the policy of the law in cases not strictly within its letter.

Secondly, on the form of the bill it was said, that Lord Cholmondeley and Mrs. Damer might be fairly stated on the bill itself to represent—not that they have a joint legal title, but at any rate only a joint equitable title—recollecting also that the manner in which the existence of that title is stated, is so cunningly devised, that no man can tell what the agreement is, out of which that joint interest can be said to have accrued. There are difficulties in supporting the bill in that view of it. There are other points also which arose in the former case of *Cholmondeley v. Clinton*: but, without adverting to them further, the ground on which I think the demurrer must be allowed is this:

The title is stated on the bill as a title, in which there has been in one sense adverse possession for above twenty years; and I believe it was the intention of the House of Lords to state this, that where there has been adverse possession, not accounted

1823.—*Ex parte Nicholl*.

for by some disability, as coverture or infancy, for twenty years, a court of equity ought not to interfere. That doctrine was resisted by urging, that in the bill it was mentioned that there were leases of the estate, which were unexpired till the year 1796; not that the lessees had not paid rent to the Clinton family, but it was insisted on the authority of some modern cases decided in the Court of King's Bench, that inasmuch as an ejectment might be brought after the period expired, provided it was brought within twenty years after the expiration of those *leases, [*119] so, by analogy, this bill might be maintained in equity.

It will be in the recollection of those who have read the judgment delivered in the House of Lords in the former case, that Lord Redesdale expressed very considerable doubt, whether the cases alluded to would be finally supported, if brought before the House of Lords. But putting the case as high as it can be put, that they could be supported, and intimating at the same time that my opinion is not expressed either one way or the other, nothing can be more clear than this, that notwithstanding those leases, Lord Clinton, according to the statement of this bill, has been in adverse possession for above twenty years. It is impossible to deny that these parties might have filed a bill in equity during the whole time the leases were in existence. I am, therefore, of opinion, upon that point of possession, that these parties, on their own statement, are not entitled to any assistance in equity.

Demurrer allowed.

EX PARTE SIR JOHN *v.* LADY NICHOLL.

1823: 1st March.

The court upon petition under the statute 56, Geo. 3, c. 60, will direct stock, which has been transferred to the sinking fund, to be retransferred to the petitioners, where their title is clear, without any reference to the Master to ascertain who is beneficially entitled to the stock.

THIS was a petition under the statute 56 Geo. 3, c. 60, praying that a sum of 437*l.* 18*s.* 10*d.* 3 per cent. consolidated bank

1823.—*Auriol v. Smith.*

annuities, which had been carried to the account of the Commissioners for the Reduction of the National Debt, under the provisions of the above-mentioned Act, might be transferred to the petitioner, Lady Nicholl.

The stock in question stood originally in the name of John Price, who died in December, 1817, having made his [*120] will, and *appointed Jane Price, his widow, sole executrix. Jane Price afterwards died; and upon her death, Lady Nicholl obtained administration *de bonis non*, with the will of John Price annexed.

The petition was first heard before the Vice-Chancellor, who directed a reference to the Master, to inquire who was beneficially entitled to the stock, and ordered that the same should be transferred into the name of the Accountant-General.

Mr. *Heald* and Mr. *Bligh* now mentioned the petition to the Lord Chancellor, stating that it had become the practice in the Vice-Chancellor's Court, upon all petitions under this Act of Parliament, to make the order which had been pronounced in the present instance; and submitted that in a clear case there ought to be no reference to the Master.

The *Attorney-General* for the Crown.

The LORD CHANCELLOR thought, that it was quite sufficient in this case, to produce the probate and letters of administration with the will annexed, and ordered the stock to be transferred to the petitioners.

[*121]

*AURIOL v. SMITH.

1823: 4th March.

Where accounts between trustee and *cestui que* trust are referred to arbitration, and the award is made a rule of a court of law under the stat. 9 & 10 W. 3, though

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there be fraudulent misrepresentation by the trustee to the arbitrators as to particular items of the account, a bill cannot be maintained by the *cestui que trust* after the time limited by the statute has elapsed, to set aside the award as to the items impeached, leaving it to stand as to the remaining items, the award upon the face of it being entire.

Where there is a palpable objection upon the face of an award, the court may refuse to enforce, but cannot set it aside, after the time limited by the statute has elapsed.

The jurisdiction in matters of award, referred under the statute 9 and 10 W. 3, is altogether transferred to the court of which the submission is made a rule; and awards of that nature must be regulated by the statute with respect to the period within which application must be made to set them aside. A case of fraud does not constitute an exception. *Semble*.

Where a party applies to set aside an award on the ground of newly discovered fraud, he is bound to show that it is a new discovery, and that he could not with due diligence have made the discovery before.

An award may be good in part, and bad in part, where the subject is clearly capable of being separated: but not where all the matters are within the submission and the award is upon the face of it entire.

IN the month of March, 1765, Andrew Jelfe died intestate, leaving a widow and eight children; and upon his death, letters of administration were granted to the widow, by whom the management of the family affairs were entrusted to the defendant Smith, who acted as trustee down to the year 1802, when the intestate's widow died, and continued in the receipt of part of the property of the intestate down to the month of August, 1804. The accounts relative to the trust having been then only partially settled, differences arose between the parties, and it was agreed that the whole of the accounts should be referred to arbitration, and that the submission should be made a rule of the Court of King's Bench. Bonds of arbitration were accordingly entered into, and on the 31st of May, 1805, the arbitrators made their award, by which they charged the defendant Smith with an entire unbroken sum of 33,647*l.* 6*s.* 2*d.* as the balance due from him, and in full of all demands. The submission was made a rule of the Court of King's Bench in Trinity Term, 1805. The property of the intestate at the time of his death, in part consisted of the sums of 5,000*l.* and 6,000*l.* 4 per cent. stock, and of a sum of 5,692*l.* 10*s.* cash, which was received by the defendant Smith, and was alleged to have been invested by him on the 4th

1823.—Auriol v. Smith.

of September, 1766, in the purchase of 5,500*l.* of the like stock. The defendant Smith, being examined before the arbitrators as a witness, with respect to these different portions of stock, stated that the same had been disposed of by the sale of one portion, and the transfer of the remainder to the parties beneficially entitled, representing the portions so sold and transferred, as portions of the identical sums of stock respectively stated [*122] to *have belonged to the intestate at the time of his decease, and to have been purchased after that time; and he produced his books of account as a verification of the fact. The arbitrators, in making their award, proceeded upon the statement made by the defendant; and the present bill was filed on the 22d of April, 1806, by the five surviving children of the intestate, who were also entitled to the shares of his widow and deceased children; alleging, that the plaintiffs had discovered, that the account of the stock transactions given by the defendant was untrue, and that he had occasionally sold out the stock which belonged to the intestate at the time of his death, and used it for his own benefit, and had not invested the 5,692*l.* 10*s.* cash in the manner alleged by him; and insisting, that the defendant, sustaining the character of a trustee, was bound to have disclosed the circumstances to the arbitrators, and that the plaintiffs would in that case have had an option, either to have had the account taken as a stock account, or to have charged the defendant with the full amount of the benefit made by the sale of the stock, in which latter case they would have been entitled to a much larger sum than was awarded to them. The bill did not seek to impeach the accounts taken between the parties generally, or to set aside the award *in toto*, but insisted that it ought be opened with respect to the three items in question; and prayed that an account might be taken of what was due from the defendant to the estate of the intestate, Andrew Jelfe, in respect of the said 5,692*l.* 10*s.*, and of the interest thereof at 5 per cent. from the 4th September, 1766, or of the moneys arising from the sale of the 4 per cent. annuities purchased therewith, in case any were purchased therewith, and of the moneys arising from the sale of the 5.000*l.* and 6,000*l.* 4 per cent annuities, and

1823.—Auriol v. Smith.

of the dividends of such several sums of 4 per cent. annuities, and of the interest of the moneys arising from the sale thereof, from the time the same were received, at the rate of 5 per cent. per annum, and of what transfers, *payments [*123] or other satisfaction had at any time been made to any person or persons entitled to the same in respect thereof; and that the defendant might be decreed to pay to the plaintiffs what should be found due on taking such account, and that they might be declared entitled to the same over and above the sums awarded to them.

The defendant, by his answer, submitted that the award ought to be wholly binding and conclusive between the parties; but stated that he had no objection to the whole of the award being set aside, and the accounts taken in the usual way under the direction of the court, without any regard being had to the award, or to what the arbitrators had done.

The case on the part of the plaintiffs was substantiated by evidence, falsifying the account given by the defendant before the arbitrators, and showing that the sums of stock in question had been repeatedly sold out and transferred: but it was proved on the part of the defendant, that the facts upon which the award was sought to be impeached, were known before the award was signed, and that the plaintiffs afterwards accepted the whole sum awarded to them, before they made any attempt to disturb the decision of the arbitrators

The cause was argued before his Honor, the present Master of the Rolls, then Vice-Chancellor, in Michaelmas Term, 1813, and the following judgment was given.

1813: *November 26th.*—THE VICE-CHANCELLOR: (a)—Upon the merits of this case, there seems to be a very fair ground for reviewing this account as to the three items in question,

(a) *Ex relations.*

1823.—Auriol v. Smith.

[*124] inasmuch as there has been a concealment or *false representation with respect to those three items, by a trustee, who is bound to give a fair account to his *cestui que trust* of the money in his hands. But the difficulty which has always struck me as to the proceedings in this case, bears upon a question of great magnitude, namely, what are the grounds upon which this court is to deal with awards and references under the statute 9 and 10 William, 3. I have looked into the authorities to see whether this court is not completely barred from giving the relief prayed by a bill to rectify an award, in the case of a reference made under the statute, where the bill is filed after the time has elapsed within which application is, under the statute, to be made for the purpose of setting aside the award, if that be the nature of the application. I have been led also to examine whether an application can be made to a court of equity, when the submission to the award is made a rule of another court; and whether the application can be made by a bill to rectify and supply the award as to certain selected items, in which there has been misrepresentation and erroneous conclusion, leaving it stand as to all the remainder of the items. A proceeding of that nature appears to me to be perfectly new; there is no instance in which such an application has ever been made; and it will be attended with great difficulty if this court can entertain such a jurisdiction, and administer such relief.

It is now clearly settled, that the references under the statute of the 9th and 10th William 3, are to be governed by the statute, and the statute has transferred the jurisdiction and given it altogether to the court of which the submission to the award is made a rule, has prescribed in what cases, and within what period, if at all, the award is to be set aside. The principle which is to determine the court in carrying into execution that very salutary and important Act is clear and settled; it is fitting that it should be considered whether there be any special exception

[*125] *to it: but the general principle is, that where the parties have selected their own tribunal, a certain period of time shall be given, after which the award shall be final and

1824.—Auriol v. Smith.

conclusive. *Pedley v. Goddard*,^(a) is a leading authority upon the construction of the Act: the question there was, whether upon an application for an attachment for non-performance of an award, the submission to which was made a rule of court by virtue of the statute, it was competent to the parties to object to the award, for any illegality apparent upon the face of it, although the time limited by the statute for applying to the court to set aside the award had expired. The distinction taken in that case is this, that if there is a palpable objection upon the face of an award, the proceeding to set it aside must be within the time limited; but that it is competent to the court, after that time has elapsed, to attend to the objection, where an application is made to enforce the award by attachment, in the same manner as if an action is brought upon an award, on the face of which there is a palpable objection. If, then, it is not competent to the parties after the period has elapsed, to apply under the statute to set aside an award, although an objection appears upon the face of it, certainly it is not upon any objection appearing extrinsic to it, either the circumstance of corruption or misconduct of the arbitrators, or fraud of the parties; it cannot be impeached in any case when the period has elapsed by any application under the statute to set it aside. The case of *Pedley v. Goddard* has ever since been followed in every court of justice, though in *Allardes v. Campbell*^(b) the court was divided upon the question, whether any jurisdiction attached where there was a reference under the statute; and though in *Braddick v. Thompson*^(c) the Court of King's Bench, when unable to permit the party by pleading a matter *dehors* the award to impeach it, threw out an idea, that *they would allow a new rule to be framed, [*126] so as to permit the party to go to a court of equity upon the subject, it being still doubtful, whether, if they did apply, a court of equity would interfere. I take that point to be settled by *Nichols v. Chalie*,^(d) and the still more recent case of *Gwinnett v. Bannister*,^(e) in which cases the Lord Chancellor has clearly

^(a) 7 T. R. 73.^(c) 8 East, 344.^(e) *Ibid*, 530.^(b) Bunb. 265.^(d) 14 Ves. 265.

1823.—Auriol v. Smith.

decided that the jurisdiction in matters of award referred under the statute, is altogether transferred by the statute to the court of which the submission is made a rule, and that awards of that nature must be regulated by the statute, with respect to the period within which application must be made to the court to set them aside. If that be so generally speaking, the question is, whether a bill can be filed to impeach an award in part to correct it in part, the submission to arbitration having been made a rule of a court of law. If the jurisdiction is a statutable jurisdiction, confined in the way prescribed by the statute, and the ancient jurisdiction of a court of equity is taken away in cases coming under the statute, the whole subject of the award must be dealt with entirely in the court to which the jurisdiction is given, and any other court has no jurisdiction over it. Then, if upon any ground a party has a right to complain of the decision of the arbitrator, upon what principle has he a right to come to any other court that has not a jurisdiction? It is said that fraud constitutes an exception; that it is against conscience for the party to insist upon such an award; and that, therefore, though undoubtedly parties are limited in general, within the period limited by the statute, and to the court that has jurisdiction over the award, yet in a case like the present, where it is against conscience, and where the discovery could not be made in time, there ought to be an exception. It will not be necessary to decide that point now: but at the same time it becomes the court to consider the difficulty which [*127] *would arise out of such a proposition. Suppose corruption was imputed to the arbitrators—has the party in that case a right to apply to a court of equity, corruption being one of the cases in which it is expressly stated the party is to apply to the court of which the submission is made a rule? Does subsequently discovered corruption transfer the jurisdiction? Why is not the party equally to apply to the equitable jurisdiction of a court of law, upon the ground of subsequently discovered corruption? One court has as much jurisdiction as another court; and there is no necessity for applying to a court of equity, supposing either court could in such case entertain

1823.—*Adriol v. Smith*.

jurisdiction. At the same time it is obvious, that if exceptions to the statute are to be permitted upon the ground of subsequently discovered corruption, all the evils will be let in which are meant by the statute to be prevented, the statute having given a time within which discovery of corruption shall be available. It is not, in my opinion, necessary to decide that question upon the present occasion, because, even if it be admitted that a party can in any case impeach an award after the period has elapsed, on the ground of newly discovered fraud or corruption, he is certainly bound to show that it is a new discovery, and further, that with diligence he could not have discovered it before—Can it be said, that throughout the whole period of time this case was before the arbitrators, these plaintiffs could not with due diligence, have discovered in what manner this stock had been dealt with? This is not a case in which subsequent discovery is proved to have been made by the party: but on the contrary the discovery was made, in part at least, previous to the award; and at all events the plaintiffs might have applied to the court within the time limited by the statute, on the ground on which they now complain. But that is not all the difficulty the plaintiffs have to contend with in the present case. This application is perfectly new. It is such an one as I never remember to have been made, even in due time, and to the proper

*tribunal. Here is an award, which upon the face of it [*128] is perfectly good, final and complete. It directs an entire sum to be paid; it does not upon the face of it distinguish how much arises from one head, and how much from the other. Is it competent then to a party to set it aside in part, and to leave it to stand in part? Can that be done in reference to an entire subject like the present? There are cases in which an award may be good in part, and bad in part; but those are cases in which the subject appears clearly capable of being separated, where, for instance, the arbitrator exceeds his authority in one subject, or proceeds to another which he has no power to award. But was there ever a case heard of, in which it was said that where all the items of an account were within the submission, and the arbitrators, having properly exercised their jurisdiction

1823.—Aurio

decided that the jurisdiction in the statute, is altogether contrary of which the submission is of nature must be regulated by the period within which appointed set them aside. If that is, whether a bill can be correct it in part, though a rule of a court of jurisdiction, confine the ancient jurisdiction of arbitrators in respect of these three coming under an award of 33,000*l.*, 20,000*l.* was ascertained to be dealt with; how would it be possible to make out this given, an account, partly under an award, and partly under upon an account of the court. It would be to substitute that which of the arbitrators had no power to do, namely, to give 20,000*l.* in any arbitrators and to leave all the other items open. How is it possible to connect with an award in that manner? How could it be enforced by attachment as to the remaining sum of 20,000*l.*, for the same not complained of? How could an action be brought upon the award to recover that? It would be sufficient to answer, there is no such award as one for 20,000*l.* in existence. In the next place, it would be a decisive objection to it, that an award for 20,000*l.* in part would not be final, and could not stand. It is impossible, then, to let the award stand as an award of particular items of an account, where the arbitrators have incorporated all into one entire sum, without stating upon the face of the award the manner in which they make up that sum; and the arbitrators having stated as the condition that the award shall be final, it is impossible for the parties to take one part of that sum and leave the account open as to the rest; they must make their election, and either seek to set aside the award *in toto*, or leave it as it is. Had they, in the proper time, applied to the court, they might, on the ground of fraud, have impeached part of it, and that would have had the effect of impeaching it *in toto*; but it is impossible to separate such an award, to make it good in part, and bad in part, when it is entire upon the face of it. These are the difficulties that

Smith.

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 ... award could be disturbed in this court. I am clearly
 ... therefore, that upon this ground the relief prayed by this
 ... cannot be granted, and the bill must be dismissed.

The plaintiffs appealed from this decree, and the appeal was argued on the 16th and 17th of March, 1822.

*Mr. Horne and Mr. Shadwell for the appellants:—It [*130] is clear that the defendant deceived the arbitrators, by concealing the facts as to the stock which he sold out; the only question, therefore, is, whether the statute makes the award conclusive. This is not a case where we seek to set aside the award, we admit it to be good so far as it goes; but one part of the accounts has not been taken, and we desire to have that added. As a trustee, it was the duty of the defendant to have informed his *cestui que trusts* of all the circumstances. The suppression was a fraud which the statute cannot be intended to sanction. The statute enacts that the process for enforcing awards shall not be stopped except within a certain time; but that enactment does not apply to this case, because no process has issued; and if an attachment is applied for, the court will consider the objections to the award; *Pedley v. Goddard*.(a) The statute then goes on to say how awards may be set aside, giving power on a summary application, but not confining by negative words the power of courts of equity to interfere upon a bill filed.

(a) 7 T. R. 73.

1823.—Auriol v. Smith.

upon the subject, pronounced one entire sum to be due, and declared that upon payment of that sum all accounts should close, the award should be bad as to some of the items, which were not before the arbitrators in the view in which they were afterwards presented to the court. In such a case the court would have, in the first place, to analyze the entire sum awarded, to discover how much of it was composed of the items complained of, and to cut it down to a different sum. Suppose that to be done in the present instance, and so much to be taken off as arose from the mistaken conclusion of the arbitrators in respect of these three items, and that instead of 33,000*l.*, 20,000*l.* was ascertained to be the remnant due; how would it be possible to make out this compound account, partly under an award, and partly under the decree of the court. It would be to substitute that which the arbitrators had no power to do, namely, to give 20,000*l.* in part, and to leave all the other items open. How is it possible to deal with an award in that manner? How could it be enforced by attachment as to the remaining sum of 20,000*l.*, for the items not complained of? How could an action be brought upon

the award to recover that? It would be sufficient to [*129] *answer, there is no such award as one for 20,000*l.* in existence. In the next place, it would be a decisive objection to it, that an award for 20,000*l.* in part would not be final, and could not stand. It is impossible, then, to let the award stand as an award of particular items of an account, where the arbitrators have incorporated all into one entire sum, without stating upon the face of the award the manner in which they make up that sum; and the arbitrators having stated as the condition that the award shall be final, it is impossible for the parties to take one part of that sum and leave the account open as to the rest; they must make their election, and either seek to set aside the award *in toto*, or leave it as it is. Had they, in the proper time, applied to the court, they might, on the ground of fraud, have impeached part of it, and that would have had the effect of impeaching it *in toto*; but it is impossible to separate such an award, to make it good in part, and bad in part, when it is entire upon the face of it. These are the difficulties that

1822.—*Auriol v. Smith*.

have impressed my mind; I have endeavored most anxiously to discover some principle upon which I could declare that the plaintiffs were entitled to relief; but when the bill is to have an account taken of partial items, when it is filed in a court that has not jurisdiction, when it is filed after the time limited by the statute has elapsed, and when the plaintiffs do not make out that the fraud upon which they proceed, was discovered posterior to the time at which resort ought to have been had to a court of justice, I think it would be going beyond what has ever been done in any case, and lead to infinite mischief, if such an award could be disturbed in this court. I am clearly of opinion, therefore, that upon this ground the relief prayed by this bill cannot be granted, and the bill must be dismissed.

The plaintiffs appealed from this decree, and the appeal was argued on the 16th and 17th of March, 1822.

~ *Mr. *Horne* and Mr. *Shadwell* for the appellants:—It [*130] is clear that the defendant deceived the arbitrators, by concealing the facts as to the stock which he sold out; the only question, therefore, is, whether the statute makes the award conclusive. This is not a case where we seek to set aside the award, we admit it to be good so far as it goes; but one part of the accounts has not been taken, and we desire to have that added. As a trustee, it was the duty of the defendant to have informed his *cestui que* trusts of all the circumstances. The suppression was a fraud which the statute cannot be intended to sanction. The statute enacts that the process for enforcing awards shall not be stopped except within a certain time; but that enactment does not apply to this case, because no process has issued; and if an attachment is applied for, the court will consider the objections to the award; *Pedley v. Goddard*.(a) The statute then goes on to say how awards may be set aside, giving power on a summary application, but not confining by negative words the power of courts of equity to interfere upon a bill filed.

(a) 7 T. R. 73.

1823.—Auriol v. Smith.

Mr. Roupell, for the respondent, contended that the plaintiffs were barred by the award and statute, and cited *Gwinet v. Bannister*, (a) *Nichols v. Chalie*, (b) *Allardes v. Campbell*, (c) *Kampshire v. Young*, (d) *Fetherstone v. Cooper*, (e) *Chicot v. Lequesne*, (g) *Godfrey v. Boucher*. (h)

Mr. Horne, in reply, cited *South Sea Company v. Bumpstead*, (i) and *Ward v. Periam*; (k) and insisted that the defendant, being bound as a trustee to disclose the facts, stood in a different situation from any other party.

[*131] *The LORD CHANCELLOR said, that the trustee and *cestui que trust* going to arbitration, put one another at arms' length like other parties, and could not be relieved, if they did not use due care in the proceeding; and desired that the registrar's book might be consulted as to the cases cited in the argument. (l)

(a) 14 Ves. 530.

(b) *Ibid*, 265.

(c) Bunb. 265.

(d) 2 Atk. 155.

(e) 9 Ves. 67.

(g) 3 Ves. sen. 315.

(h) 3 Vin. Abr. 139.

(i) *Ibid*, 140.

(k) 1 Eq. Cas. Abr. 91.

(l) The following notes of the cases of *Ward v. Periam* and *Allardes v. Campbell*, and of the case of *Reynell v. Luscombe*, referred to in the report of *Allardes v. Campbell*, were furnished to the Lord Chancellor.

WARD v. PERIAM.

[2 Eq. Cas. Abr. 91.]

The order on the hearing of this cause for further directions, on the 21st April, 1721, is in these terms:—

This cause coming on the 20th day of May last, to be heard and debated, the scope of the plaintiff's bill being to set aside the award dated the 18th day of December, 1718, made by the defendants Walker and Lloyd, as arbitrators between the plaintiff and the defendant Periam, touching several matters of account depending between them, and touching which there was a former suit pending in this court between the said plaintiff and defendant Periam, and that the defendant's proceedings at law on the award bond entered into by the plaintiff might be stayed, and said bond be delivered up to be cancelled. The said plaintiff by his bill charg-

.1823.—Auriol v. Smith.

March 4th.—THE LORD CHANCELLOR:—When this [*132] case came before Sir T. Plumer, he was of opinion, that

ing, that by the decree in the former cause, an account being directed to be taken by Mr. Browning, then one of the Masters of this court, the defendant Periam found there would be a great balance due thereon to the plaintiff, and applied to him that they might settle the account between themselves, to which the plaintiff agreed; but they differing between themselves on some items, it was agreed to refer the matters to the arbitration of said defendants Walker and Lloyd, and of one John Jenkins, or of any two of them, and that said Walker and Lloyd proceeded with great partiality, and awarded the plaintiff to pay the defendant 324*l.* 19*s.* 3 1-2*d.* although they ought to have awarded the defendant Periam to have paid the plaintiff 100*l.* and upwards, besides costs of suit; and that after said award made, the defendant Periam assigned the benefit thereof to the defendant Mitchell, in trust for the defendants Dally, Selleck and Tassell; since which the defendant Periam became bankrupt, and his effects had been assigned to the defendant Lloyd, who put the award bond entered into by the plaintiff in suit; whereto the defendants Periam, Lloyd and Walker insisted that said award was just, and was fairly made; and the defendant Lloyd insisted that the same ought not to be set aside, and the rather for that the plaintiff had himself caused the award to be made a rule of the Court of King's Bench; and though he afterwards caused the said court to be moved that the same might be set aside, could not prevail therein. Whereupon, and the pleadings in the cause being then opened, and upon hearing of the bond of submission dated the 17th day of October 1718, the rule whereby the said submission was made a rule of the Court of King's Bench, the rule for the defendant Periam to show cause why the said award should not be set aside, and the rule made upon his showing cause to discharge the last rule, and the Act of Parliament for determining differences by arbitration, read, and what was insisted on by the counsel for all the said parties; his Lordship thought fit, and so ordered, that it should be referred to Mr. Lightbome, one of the Masters of this Court, to state what proceedings there had been in the Court of King's Bench, and how far the defendants had insisted on those proceedings by their answers. In pursuance whereof the said Master made his report, dated the 25th November, 1720, and thereby certified, that on the 11th February, in the fifth year of his Majesty's reign, on the plaintiff Ward's motion, a rule of the Court of King's Bench was made, that the submission of the matters in difference between him and the defendant Periam should, according to the form of the statute, be entered and made an order of the same court; and on the same day of the plaintiff Ward's motion, another rule was made of the same court, on reading the affidavit of the plaintiff Ward and Mr. John Jenkins, whereby the first day of the then next term was given to the defendant Periam, to show cause why the arbitration between the parties lately made should not be made void; and that on the 25th day of April following, the defendant Periam coming to show cause, after some considerable debate of the matter, the court was divided in opinion, two judges against two judges, as to the setting aside said award, and thereupon a rule was made that said former rule should be discharged, and said master by his report

 1823.—Auriol v. Smith.

the circumstance of the award having been made a rule
 [*133] *of the Court of King's Bench, might have been a bar
 to a bill to set aside the award altogether, and that a

further certified, that after said rule of 25th April, one or more motions were made in the King's Bench on the defendant Periam's behalf, for an attachment against said Ward for non-performance of said award, but that no rule was thereupon made.

And the cause coming this present day to be heard before his Lordship for further directions, in the presence of counsel learned on all sides, whereupon, and upon the debate of the matter, and hearing said Master's report, the decretal order dated the 13th November, 4th *Georgii Regis*, with defendant Walker's answer, and the proofs taken in this cause, read, and what was alleged by the counsel for all said parties, his Lordship declares that it appears that said award was unfairly obtained, and doth therefore order and decree that the same be set aside, and that the defendant Lloyd do acknowledge satisfaction in the judgment obtained on the award bond, and that the defendant Walker do pay unto the plaintiff his costs at law, and of this suit, to be taxed by said Master.

ALLARDES v. CAMPBELL.

[Bill filed *Mich. Term*, 2 *Geo.* 2, Roll 146.—Bunbury, 265.]

The bill in this cause stated, that the parties reciprocally entered into bonds in the penalty of 1,000*l.* conditioned for the performance of the award of two arbitrators, to whom they had agreed to refer all matters in difference between them, or if the two arbitrators disagreed, of such umpire as they should appoint, with a clause that the award or umpirage should be made a rule of the Court of King's Bench. It stated that the arbitrators made no award, but appointed an umpire; that he made his award, directing the plaintiff to deliver up the note of hand on which he founded his demand against the defendant, but that he made such award without hearing plaintiff or giving him an opportunity to produce his vouchers or proofs; that he had informed the plaintiff that he did not mean his award to be final, but that the same should be revised if the plaintiff was dissatisfied; and that the defendant also agreed, that if the plaintiff was dissatisfied there should be a further reference, and new bonds of reference should be entered into. The bill charged that the umpire misconducted himself, that the award was unwarrantable, framed on untrue suggestions, and got by surprise and without due method had, or good consideration taken by the umpire. It stated that the defendant had made the submission a rule of the Court of King's Bench, and was proceeding against plaintiff on an attachment issued out of that court; and it prayed for an account between the parties, and for an injunction to restrain the defendant's proceeding on the bonds of submission, or by any rule or process of the King's Bench.

The defendant pleaded, and set out the award at length, also a rule of the King's Bench, making the submission a rule of that court, and stated that he moved the

 1823.—Auriol v. Smith.

fortiori it was an answer to a bill to set aside the award in part. The case was argued in two ways. *It was [*134] insisted by the defendant, that this court has no authority

King's Bench for an attachment against plaintiff for non-performance of the award, that plaintiff then obtained a rule for defendant to show cause why the award should not be set aside, and that that rule was, upon hearing counsel on both sides, discharged. He then stated the statute of William and Mary, and averred that the award was not procured by corruption or any other undue means, and that the umpire did not misbehave himself; that the award was made absolutely and without any condition as to the plaintiff's being satisfied with the same; that no complaint was made to the King's Bench, before the last day of the term after the award made, that the umpire had misbehaved; whereby the award was conclusive, and not liable to be impeached in any court of law or equity; that the plaintiff had exhibited a bill in Chancery for relief, to which the defendant had pleaded, and his plea was allowed, and the bill since dismissed for want of prosecution, and the defendant therefore pleaded the said statute of William and Mary, and the other matters aforesaid, in bar of all discovery and relief sought by the bill.

This plea was upon argument ordered to stand for an answer, with liberty to the plaintiff to except, exceptions were taken, and a long answer put in: but upon search made it does not appear that the cause was ever heard.

REYNELL v. LUSCOMB AND PERROTT.

[Bill filed *Trim. T.*, 9 Geo. 1. Decree *2d May*, 1727. Roll 138.]

In this case it was found necessary to refer to the original records in the Exchequer at Westminster.

The bill set forth a submission to arbitration of differences between Reynell and Perrott, by bonds which both entered into, with a clause that either might move to have the submission made a rule of the Court of King's Bench. It stated the award made by the arbitrator, that the defendant unduly obtained the same, and to defeat the plaintiff of his legal remedy, and to deprive him of an opportunity of making a legal complaint of the corrupt practices aforesaid, neglected to make the submission a rule of the Court of King's Bench, till it was too late for the plaintiff to apply to the court to set aside the award according to the directions of the statute, that the plaintiff was thus remediless by the rules of law, by the defendant's contrivance, and, therefore, the prayer was that the award might be set aside, for an account, and for an injunction to stay the defendant's proceedings at law.

The answer denied each individual act of complaint, and improper conduct in the arbitrator, charged in the bill, and denied that any contrivance had been used by

1823.—Auriol v. Smith.

to set aside an award made a rule of a court of law under the statute of William. And for this purpose were cited [*135] several cases: *Allardes v. Campbell*, *and two cases before me—*Nichols v. Chalie*, and *Gwinett v. Bannister*; in the latter of which cases, I consulted Lord Ellenborough, who was of opinion, that the statute was imperative upon a court of equity, as well as a court of law. Supposing these authorities [*136] *untouched, it was contended by the plaintiffs, that there had been fraud on the part of this trustee, that when this matter was before the arbitrators, it was his duty to have stated to them what he had done, and that his having withheld the information was fraud; and it was insisted, that an award obtained by fraud could stand no higher than a judgment obtained by fraud; and as a judgment obtained by a fraud was a nullity, an award obtained by fraud was a nullity. The first answer that the Master of the Rolls gives to this argument is, that when parties refer their differences to an arbitrator, they put themselves at arms' length from each other, and that the plaintiffs were at liberty to ask the defendant all manner of questions. A second answer is, that though the argument might have been good, if the bill had been to set aside the award *in toto*, it is a different thing, when one entire sum has been awarded, to come upon this principle to correct the award as to part only. A third answer is, that the plaintiffs, without putting any question to the defendant, might have discovered the truth; and it was proved that before six months had expired the fact was known, and yet instead of applying to set aside the award with-

the defendant, to prevent the plaintiff's motion in the King's Bench to set aside the award, and alleged that on the contrary, the plaintiff practised on the subscribing witnesses of the bonds of submission, to prevent their making an affidavit of the execution, which was necessary in order to their being made a rule of court, that the defendant was in consequence much delayed in making this submission a rule of court, but that the plaintiff might, after this was done, have moved the court to set aside the award, and in fact did send some affidavits to London in order to a motion being made, but did not make any.

The cause being prosecuted to issue, witnesses were examined; and upon hearing, the bill was dismissed with costs.

1823.—Auriol v. Smith.

in the time appointed by the statute, they went on to take the whole benefit of the award for the entire sum ; and having done so, at length filed this bill to set aside the award in part. The Master of the Rolls reasons also in this way : You could not bring an action for part of an award, nor could you have an attachment for part ; for then the objection would hold good at law, that the award in that state is not final. On these and other grounds, I feel myself unable to struggle against this decree ; and, therefore, though not without reluctance, I affirm it.

Decree affirmed.



REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY,
COMMENCING IN THE
SITTINGS BEFORE MICHAELMAS TERM,
4 GEO. IV., 1823.

EX PARTE TOWN, IN THE MATTER OF ALCHIN.

1823: 10th April.

The court will not direct a reference to the Master as to the reduction of rent upon the petition of a tenant.

THIS was the petition of one of the tenants of a lunatic's estate, praying a reference to the Master to inquire whether it was proper that any reduction should be made in his rent.

THE LORD CHANCELLOR desired it to be understood, as a general rule, that he would not make the order which was prayed, upon the petition of the tenant.^(a)

Petition dismissed with costs.

*Mr. *Horne* for the petition.

[*188]

Mr. *Garratt* for the committee.

Mr. *Sugden* for the next of kin.

(a) Upon a similar petition on the preceding day, the Lord Chancellor observed, that in future every application for a reduction of the rent of a lunatic's estate must be made by the committee, and that the Master should in such cases always be di-

 1823.—Head v. Head.

rected to inquire, whether it would not be more for the benefit of the lunatic's estate that the tenant should give up his lease, than that his rent should be reduced. *Ex parte West.*

HEAD v. HEAD.

1823: 16th and 24th April.

Where personal access between husband and wife is established, sexual intercourse is to be presumed; and the presumption must stand till rebutted by clear and satisfactory evidence.

Miscarriage of a judge, in directing a jury, is not a ground for a new trial, if, looking at the whole evidence and the address of the judge to the jury, the conscience of the court is satisfied.

THIS was a motion for the new trial of an issue, directed by the Vice-Chancellor, upon the question whether the plaintiff was the legitimate child of William Head.

The following facts were proved at the trial; that William and Elizabeth Head intermarried on the 9th of November, 1795, and that disagreements having arisen between them, in consequence of the husband's habitual drunkenness, a separation took place in June, 1797; that in November, 1797, Elizabeth Head went to reside at the house of her uncle, Thomas Randall, who had a son, James Randall, living with him, and that William Head was in the habit of visiting his wife during her residence at Thomas Randall's house; that upon the occasion of the last interview between them, which took place in July or August, 1798, they were alone in a kitchen for some time, and that

Elizabeth Head afterwards became pregnant, and left [*139] Mr. Randalls'; that on the 7th of May, 1799, *the plaintiff was born, and was baptized by the name of James, the son of William and Elizabeth Head. That William Head died on the 30th of August, 1800, and that in 1806, Elizabeth Head intermarried with James Randall, and had afterwards another child Francis; it was also proved, that after the marriage of his mother, the plaintiff was sent to school by the name of

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James Randall, and that he had subsequently used, and been known by that name, but there was no evidence of any familiarity having passed between James Randall and Elizabeth Head, up to the time of her leaving the house of Thomas Randall.

The new trial was moved for on the ground of a misdirection by Mr. Justice Burrough, before whom the issue was tried, who had laid down the law to the jury, in the language of Lord Ellenborough in the case of *The King v. Luffe*,^(a) the effect of which was, that where a child is born of a married woman, the husband is to be presumed to be the father of it, unless there be evidence to show the absolute physical impossibility of the fact.

The motion had been made before the Vice-Chancellor, and refused; and the same line of argument was adopted in support of the motion, which had been urged in the court below.

Mr. Serjeant *Lens* and Mr. *Pepys* for the motion.

Mr. *Heald* and Mr. *Phillimore* against it.

THE LORD CHANCELLOR:—If I rightly understand that case of *The King v. Luffe*, I take it directly to establish no more than this, that if a *man be proved to have had [*140] sexual intercourse with his wife, yet still if it can be shown that it was impossible that the child of the wife should be his child, it is competent to a party, notwithstanding sexual intercourse between the husband and wife be proved, to establish by evidence the impossibility that such sexual intercourse could bring the child into existence. There is no denying that in what fell from the judges in that case, there are very strong passages to show, that beyond that they did not mean to determine, how far the old rule of law, as to the husband's being within the four seas, was or was not to be affected.

The case of the Banbury Peerage was decided in the House

(a) 8 East. 193.

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of Lords after very great consideration, and upon that occasion some questions were put to the judges. Now it is well known, that the questions proposed to the judges by the House of Lords, though made to approximate so nearly to the questions to be determined, as to enable the House to form a judgment on the case actually before it, cannot be the very questions which the house is called upon to decide. The answers given by the judges, therefore, although entitled to the greatest respect, as being their opinions communicated to the highest tribunal in the kingdom, are not to be considered as judicial decisions, but in that case of the Banbury Peerage, I take them to have laid down, so as to give it all the weight which will necessarily travel along with their opinion, although not a judicial decision, that where access according to the laws of nature, by which they mean, as I understand them, sexual intercourse, has taken place between the husband and wife, the child must be taken to be the child of the married person, the husband, unless on the contrary it be proved, that it cannot be the child of that person. Having stated that rule, they go on to apply themselves to the rule of law where there is personal [*141] access, as contra-distinguished from *sexual intercourse, and on that subject I understand them to have said that where there is personal access, under such circumstances that there might be sexual intercourse, the law raises the presumption that there has been actually sexual intercourse, and that that presumption must stand till it is repelled satisfactorily by evidence that there was not such sexual intercourse. What is satisfactory evidence that there was not such sexual intercourse, is a question which may be put in two points of view: first, is it meant that it must be proved, from circumstances which took place at the time that that personal access, which might or might not give an opportunity of sexual intercourse, was had, or by the evidence of persons present, that sexual intercourse did not take place? or, secondly, that you are to go into all the evidence as to the conduct of the parties prior to the interview in which personal access was had, and their conduct after that interview, in order to satisfy yourself, by the evi-

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dence of circumstances both previous and subsequent to the interview, what did or did not pass when that interview was had. Whenever it is necessary to decide that question, great care must be taken, regard being had to this, that the evidence is to be received under a law which respects and protects legitimacy, and does not admit any alteration of the *status et conditio* of any person, except upon the most clear and satisfactory evidence. It does not appear to me to be necessary now to ascertain what is the actual rule of law upon the subject; upon my recollection of the *Banbury Peerage Case* it was the opinion of the judges, that where personal access is established, sexual intercourse is to be presumed, and that that presumption must stand till done away with by clear and satisfactory evidence, whether that evidence apply directly to the period at which personal access was proved, or whether it may be called satisfactory, if it apply not to that period, but to antecedent and subsequent periods, in one way or other the rule must be established.

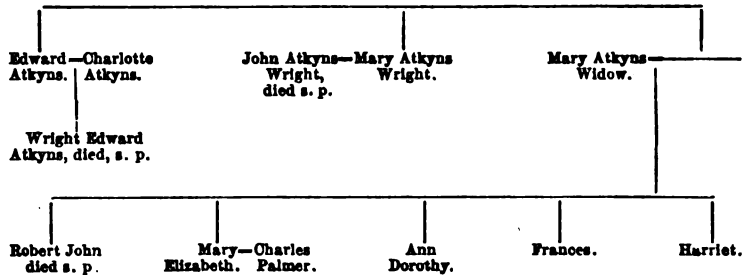
*The LORD CHANCELLOR then observed upon the [*142] doctrine of courts of equity as to new trials, that if evidence which ought to have been received has been refused, or evidence which ought to have been refused has been admitted, or if in some instances the judge can be shown to have miscarried in his directions to the jury, the court will not grant a new trial, if looking at the whole evidence before the jury, and the address of the judge to the jury, its own conscience is satisfied; and concluded by remarking that if the jury, upon the evidence, had found it a case of illegitimacy, he should have granted a new trial, and that it would be dangerous beyond measure for the court to say that such evidence as was given at the trial was evidence to repel or break down the presumption of law.

New trial refused

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PEDIGREE,

(REFERRED TO IN THE FOLLOWING CASE.)



[*143] *MARY ATKYNS WRIGHT, WIDOW; ARTHUR EDWARD HOWMAN, CLERK; CHARLES PALMER, ESQUIRE, AND MARY ELIZABETH HIS WIFE, LATE MARY ELIZABETH ATKYNS; ANN DOROTHY ATKYNS; AND MARY ATKYNS, WIDOW *v.* CHARLOTTE ATKYNS, WIDOW; ELIZABETH BERNEY; THOMAS TRENCH BERNEY; FRANCES ATKYNS; AND HARRIET ATKYNS.

1823: 17th, 19th, 21st and 26th April.

Devise to A. and her heirs forever, in the fullest confidence that after her decease she will devise the property to my family; A. is tenant in fee.

Where a decision which is to bind others, can only be made hereafter, it is the duty of the court, in the meantime, to preserve the property in such a state, that when it is made out who are the objects of favorable decision, they may have the benefit of it.

The court therefore refused to interfere by injunction to restrain A. from cutting down timber, upon a bill filed by persons claiming to be interested under the foregoing devise after the death of A., but ordered that A. should be at liberty to cut the timber, in a husbandlike manner, as tenant in fee, giving security for the value, or bringing the value into court.

Under an immediate devise to A. for life, remainder to "my family," the heir at law of the testator is entitled in remainder.

To create a trust by means of an obligation imposed upon the conscience of a devisee, the words must be imperative, the subject must be certain, and the object as certain as the subject.

The words in the fullest confidence are imperative.

Whether, where an estate in fee is given to the devisee, the trust shall be considered so restrictive, that the tenant in fee shall not be at liberty with respect to

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timber and mines to treat the estate in the same husbandlike manner as another tenant in fee. Query.

The context will affect the construction of words in a will; whether the purposes of the testator, and the nature of the enjoyment given to the individual in other parts of the will, may not also affect the construction. Query.

The word "relations" means persons entitled according to the Statute of Distributions, and is a term that sufficiently describes a class of persons.

The word "descendants" is capable of such a construction, as to show who fall within the class which that word describes.

WRIGHT EDWARD ATKYNS, the only son of the defendant, Charlotte Atkyns, made his will in the following form:
 I, Wright Edward Atkyns, give, *devise and bequeath [*144] all my manors, messuages, farms, lands, tenements, advowsons and hereditaments, as well leasehold as freehold and copyhold, or of whatever tenure or tenures the same may be, situate in Kettering lane, and elsewhere, in the county of Norfolk, and all my other real estate whatsoever and wheresoever, and of what tenure or tenures soever, unto my dear mother, Charlotte Atkyns, and her heirs for ever, in the fullest confidence that after her decease she will devise the property to my family; and I do hereby subject and charge the aforesaid premises to and with the payment of all such just debts as I shall owe at the time of my decease; and I do hereby give and bequeath to my aforesaid dear mother, Charlotte Atkyns, all my goods, chattels and personal estate for her own benefit, after payment of my debts, funeral expenses, the expenses of proving this my will, and all expenses incident to the due execution thereof; and I appoint the said Charlotte Atkyns sole executrix of this my will.

The former suit of *Wright v. Atkyns*(a) was instituted by John Atkyns Wright, the uncle and heir at law of the testator, in which suit, after alleging that, as the personal representative of William Wright and Mary Wright respectively, he had become an incumbrancer upon the estates devised by the will of the said Wright Edward Atkyns, the legal fee in those estates having

(a) 17 Ves. 255; Coop. Chan. Cas. 111; 19 Ves. 299.

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been conveyed to Sir James Graham upon trust, to secure 2,700*l.* due to the said William Wright, and the equitable fee having been vested in him, the said John Atkyns Wright, upon trust to sell for the payment of debts, and, amongst others, of a debt of 1,000*l.* due to the said Mary Wright, he insisted that he was entitled to have part of the estates sold for the payment of his incumbrances, and he raised the question, whether the [*145] said Charlotte Atkyns, who was a defendant in the *suit, as the devisee and executrix of the said Wright Edward Atkyns, was tenant for life, or tenant in fee, of the estates devised to her, by suggesting, that in order to determine how far those estates were to be burdened with both the principal and interest due to him, the said John Atkyns Wright, it was necessary to decide whether the said Charlotte Atkyns was bound to keep down the interest, a question which depended upon the extent of her interest in the estates.

By the decree pronounced by the late Master of the Rolls, Sir William Grant, on the hearing of the aforesaid suit, on the 13th of July, 1809, it was declared that the said Charlotte Atkyns was only tenant for life of the estates devised by the will of the said Wright Edward Atkyns, and that the said John Atkyns Wright was entitled to raise by sale of the said estates, what should be found due to him for principal and interest, accrued at the time the said Charlotte Atkyns took possession thereof, and that what should be found due for interest accrued since the said Charlotte Atkyns took possession, ought to be answered by her personally; and it was ordered, that what should be found due for principal and interest to the time the said Charlotte Atkyns took possession of the said estates, should be raised by sale accordingly.

After the decree of the Master of the Rolls, an injunction was granted by the Lord Chancellor to restrain the defendant Mrs. Atkyns, from cutting down timber on the estates, (a) and his Lordship subsequently affirmed his Honor's decree. (b)

(a) Coop. Chan. Cas. 111.

(b) 19 Ves. 299.

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An appeal having been presented to the House of Lords, by the defendant Charlotte Atkyns, from the decree of the Master of the Rolls, affirmed by the Lord *Chancellor, [*146] and from the order by which the injunction was awarded; their Lordships were pleased to reverse the original decree, and the decree of affirmance, so far as they declared that the said defendant was only tenant for life of the estates therein mentioned, and all directions consequent thereupon, and they also reversed the order for the injunction, so far as the same was founded on the aforesaid declaration, with liberty to the said defendant to apply to the Court of Chancery, as she should be advised, touching such injunction, as awarded on any other ground.

Part of the estates having been sold, pending the appeal from the decree at the rolls, and the moneys arising from the sale having been applied in payment of the principal and interest directed to be raised by the decree, the injunction in the former suit was, immediately after the reversal of the decree in the House of Lords, dissolved by the Lord Chancellor, upon the motion of Mrs. Atkyns, supported by an affidavit, that the principal interest and costs due to the said John Atkyns Wright in respect of his incumbrances, had been fully paid and satisfied.

The present bill was filed for the purpose of obtaining a fresh injunction, and after stating to the effect hereinbefore set forth, it proceeded to state that the said testator, Wright Edward Atkyns, died in the month of November, 1804, leaving the said John Atkyns Wright his uncle and heir at law, and that upon the death of the testator, the defendant Charlotte Atkyns entered into possession of the manors, and freehold and copyhold hereditaments, devised by his will; but that the testator was not at any time during his life possessed of any leasehold estates whatever.

The bill then stated, that the said John Atkyns Wright, by his will, dated the 7th of June, 1814, devised all his real

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[*147] estates whatsoever and wheresoever, with the *exception of certain estates therein specified, to the plaintiff Arthur Edward Howman, and his heirs, to the use of his the testator's wife, the plaintiff Mary Atkins Wright for life, with remainder (after and subject to certain uses in favor of the testator's nephew Robert John Atkins and his children, which failed of taking effect) to the use of his the testator's niece, the plaintiff Mary Elizabeth Palmer for life, with remainder to the use of the plaintiff Arthur Edward Howman and his heirs during her life, in trust to preserve contingent remainders, with remainder to the use of the first and other sons of his said niece successively in tail male, with remainder to the use of all the daughters of his said niece as tenants in common in tail general, with remainder to the use of his the testator's niece the plaintiff Ann Dorothy Atkins for life, with the like limitations in remainder, in favor of her sons and daughters in tail, with the ultimate remainder to the use of his own right heirs forever.

The bill next stated, that the said John Atkins Wright died on the 5th of March, 1822, leaving the plaintiff Mary Atkins his sister and heiress at law, and that there was no issue of the plaintiffs Mary Elizabeth Palmer and Ann Dorothy Atkins, and that the plaintiff Mary Atkins therefore claimed to be entitled to the estates devised by the will of the said Wright Edward Atkins, for the first estate of inheritance therein, as the heiress at law of the said John Atkins Wright, under the ultimate limitation contained in his will. It was further alleged by the bill, that the plaintiff Mary Atkins was the person then answering the description of heir at law of the said Wright Edward Atkins, and that she claimed to be entitled to the aforesaid estates in that character also.

After further stating certain indentures of lease and release, dated respectively the 2d and 3d of July, 1821, by
[*148] which the estates devised by the will of the said *Wright Edward Atkins, were conveyed by the said defendant Charlotte Atkins, for all her estate and interest therein, to the

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said defendants Thomas Trench Berney and Elizabeth Berney, upon certain trusts therein mentioned, for securing to the said last-named defendants, several sums of money due to them respectively, and subject thereto, upon trust for the said defendant Charlotte Atkins, her executors, administrators and assigns; and which said indentures contained a power for the said defendants Thomas Trench Berney and Elizabeth Berney, to fell all such timber upon the said estates as could be lawfully felled by the said defendant Charlotte Atkins; the bill charged, that the defendant Charlotte Atkins took only a beneficial estate for life in the estates devised by the will of the said Wright Edward Atkins, with remainder in fee to John Atkins Wright, the heir at law of the said Wright Edward Atkins at the time of his decease; and it further charged, that the legal fee in the aforesaid estates was then vested in Sir James Graham; and that if the said Charlotte Atkins should be considered as taking an equitable estate of inheritance therein, yet, that subject to a beneficial life interest, she must be considered as a trustee of the inheritance, for the said John Atkins Wright, and those claiming under his will, or for the person who should answer the description of the heir at law of the said Wright Edward Atkins at the time of her decease, the plaintiff Mary Atkins being the person then answering that description.

The bill then adverted to the circumstance, that the defendant Charlotte Atkins might be considered as having had a power to devise the estates, and charged that she could not, under such power, have devised the same to any person but the said John Atkins Wright, the heir at law of the testator Wright Edward Atkins at his decease, and that in the events that had happened, her power of devising was gone, and that the plaintiffs *and those who might thereafter claim under the will [*149] of the said John Atkins Wright, ought to be considered as entitled to the estates, subject to the life interest of the said Charlotte Atkins; and upon the supposition that the power of devising might be considered as still existing; the bill charged that under such power, the defendant Charlotte Atkins could

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not devise the estates to any person, but the person answering the description of the heir at law of the said Wright Edward Atkyns, at the time of her decease, and that the plaintiff Mary Atkyns was the person then answering that description.

The bill further charged, that although the defendant Charlotte Atkyns should be considered as having a power to devise the estates, either to the person who might answer the aforesaid description, or to any person comprehended in the popular sense of the word family, yet that in default of and until appointment, the inheritance of the estates must be considered as having vested in the said John Atkyns Wright, either as the person designated to take under the will, in default of and until appointment, or by way of resulting trust, and as having passed by the will of the said John Atkyns Wright; or that such inheritance must be considered as vested in the plaintiff Mary Atkyns, as the person then answering the description of the heir at law of the said Wright Edward Atkyns.

After further charging that the plaintiff Mary Atkyns had four children, the plaintiffs Mary Elizabeth Palmer and Ann Dorothy Atkyns, and the defendants Frances Atkyns and Harriet Atkyns; and that the said plaintiff Mary Atkyns, and her said four children, were the only persons of the family of the testator Wright Edward Atkyns, on his father's side, then in existence; and stating, that the defendants had actually cut down a large quantity of timber, and threatened to cut down [*150] all the *timber standing upon the estates; the bill prayed that an account might be taken of the timber cut down by the defendants, and that they might be decreed to make good the value thereof, and for an injunction to restrain them from cutting down any more timber or committing any other waste upon the premises.

The *Attorney-General*, Mr. *Wetherell*, Mr. *Shadwell* and Mr. *Lynch* moved for the injunction:—Where property is in dispute between two contending parties, this court will interfere for the

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purpose of preserving it, till the question of right can be determined. It is unnecessary, for the purpose of this motion, to enter into a detailed argument upon the construction of this will: the injunction must be granted, if the court is satisfied that there is so much doubt upon the instrument, that the property ought to remain in its present state till the hearing of the cause. The heir at law has a right to call upon the court to preserve the property, either upon the principle laid down in *Morice v. The Bishop of Durham*,^(a) that if a testator declares an intention to raise a trust, and the trust is too general and undefined to be carried into execution, the heir at law must take; or upon the ground that he has a title, as the person pointed out by the general description "my family," according to the authority of *Chapman's Case*,^(b) *Counden v. Clerke*,^(c) *Crossley v. Clare*.^(d) If Mrs. Atkyns be considered as having a power to devise these estates, either the heir at law of the testator, or the persons answering the description of his family in a popular sense, all of whom are before the court, must have a vested interest, subject to the power; and all the cases establish the proposition, that where there is an estate *for life, with a power of [*151] appointment, and interests vested, subject to be divested by the exercise of the power, the persons having those vested interests, have a right to call upon this court to secure the property; *Hands v. Hands*.^(e) The refusal of the court to grant the injunction, will be tantamount to a decision that Mrs. Atkyns has an unlimited property in the timber. We rest our case not upon the title of the plaintiffs only, but upon the ground that there is a question to be discussed in the cause, and that the court will take care that, in the meantime, the rights of the parties shall not be prejudiced.

Mr. Hart and Mr. Preston, for the defendant Charlotte Atkyns.

Mr. Sugden and Mr. Morley, for the defendants Elizabeth Berney and Thomas Trench Berney:—If there has been delay in

(a) 10 Ves. 522.

(c) Hob. 29.

(e) 1 T. R. 437.

(b) Dy. 333.

(d) Amb. 397.

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the assertion of title, it is the habit of this court, when called upon to grant an interim injunction, to refuse its interference. From the death of the testator, these parties have never, till the present bill was filed, asserted that the heir at law had a title. The former suit was instituted by the heir at law in the character of incumbrancer only, and, therefore, affords no answer to the objection of delay. In this view of the subject, the court ought not to grant the injunction even if the case were more doubtful. It was decided by the House of Lords, that during the life of Mrs. Atkyns it must remain a matter of uncertainty, whether the expressions contained in this will are recommendatory or mandatory; in the meantime, no person in existence has such an interest, as can be the foundation of an application to this [*152] court for its interference. It has been suggested, *that the gift to Mrs. Atkyns might be considered as a devise in fee to her, coupled with a condition, and that upon breach of the condition, the heir at law would have a right to enter for the condition broken; but the question whether the condition is performed or not cannot arise till after the death of Mrs. Atkyns. If this injunction be granted, and every one of the present plaintiffs dies, upon what principle could any collateral branch of the family maintain a supplemental bill? Could they show such a transmission of interest as to entitle them to the benefit of this suit? This testator has given an estate in fee to Mrs. Atkyns, and with it he has given to her all the rights incident to the fee. Suppose a person grants to another, upon condition that at his death he should devise to a third—is there any instance in the books, in which the owner of the fee has been restrained from committing waste? Is there any instance in the doctrine of estoppel, in which a person having a base fee, has been deprived of the rights incident to the fee? On the contrary, persons having a limited ownership only, have been permitted to commit waste; tenants in tail, for instance, after possibility of issue extinct. The usual effect of an interim injunction is, that at the termination of the suit, the estate is delivered up to one party or the other, with all the benefit which has accrued from the injunction having been awarded, but the effect of this injunction will be to deprive

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the defendants of the right in question, to decide at once that they are not entitled to the timber. The bill does not pray that the rights of the parties may be declared, and until the rights of the parties are decided, the injunction, which must be a consequence of the right, cannot be granted.

The *Attorney-General* in reply:—If this court cannot interfere till it is ascertained what parties will eventually become entitled, in what manner *can the property in the mean- [*153] time be preserved? In *Hands v. Hands* the court interposed to preserve personal property, in favor of persons having contingent interests; can there be any difference in this respect between real and personal estate? Had this been the case of an immediate devise, the construction to be put upon the words "my family" could not have been doubted; it is settled by a long train of decisions, that a devise to a man and his family gives a fee to the devisee, because the family means the heir at law. A devise to A. for life, with remainder to the family of B., gives a vested remainder to the heir at law of B., if B. dies in the lifetime of the testator. *Chapman's Case*, (a) Lord Hardwicke in *Pyot v. Pyot*, (b) considered it to be so settled. In the present case, either the words "my family" mean the heir at law, or family is synonymous with relations; in either case the objects of the trust are sufficiently certain. It is not denied that the subject is also certain, but it is said that the fee is given to Mrs. Atkyna. The court must look not merely at what is the extent of interest in the party, but what was the beneficial enjoyment intended by the testator. If this testator had devised to Mrs. Atkyna and her heirs, upon trust that at her death she would devise to his relations, there can be no doubt that she would have taken an estate for life, with a trust to give to his relations, and with a vested remainder to those relations, in case she made no appointment. Could it have been contended in such a case that she would have been at liberty to cut down timber? In *Stansfield v. Habergham* (c) the court restrained

(a) Dyer, 333.

(c) 10 Ves. 273.

(b) 1 Ves. Sen. 335.

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an heir at law, who was entitled by way of resulting trust until the determination of an event, upon which future contingent estates were to arise, from cutting timber; at law the heir had the fee, but the court interposed, because it was the intention *that he should have a limited interest only.

[*154] Your Lordship has supposed the case of the testator having had estates *ex parte paterna, ex parte materna*, copyhold and leasehold estates, and has asked, what would then have been the meaning of the words "my family?" If the testator had devised to Mrs. Atkyns for life, with remainder to his heir at law, the same difficulty would have presented itself. The answer to it is, that the testator having blended the real and personal estates together, they must both go to the same person, and that the party entitled to the real estate must take the personal also. In *Doe dem. Thwaites v. Over*,^(a) there was a devise of freehold property to the relations on my side, it was said, what is meant by relations as to freehold property? The court held, that those should take who would be entitled to personal estate under the Statute of Distributions. The question is not yet ripe for determination, who shall be considered to constitute the family of the testator, but we contend that it means the heir at law only, or at all events does not mean more than relations, and, therefore, that a trust is raised for objects which are sufficiently certain.

THE LORD CHANCELLOR:—Upon reconsidering this case, I am perfectly satisfied that there is no ground to say that Mrs. Atkyns is only tenant for life; if there is any obligation upon her to abstain from cutting timber, it must be upon the ground, not that she is tenant for life, but that being tenant in fee, her tenancy in fee is qualified in such a way, that she has not such an interest in the timber, as to be entitled to apply it to her own use.

It has been strongly intimated in the House of Lords, [*155] *that no decision can be made upon the right to the

(a) 1 Taunt. 263.

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timber till after the death of Mrs. Atkyns, upon the ground that if she makes no will, there may be persons who will say they are entitled to the produce of the timber; and that if she does make a will, she may select as objects of her favor, persons against whom it may be contended that the words "my family" designating a certain person or persons, they are incapable of taking a beneficial interest. Of course a great many questions of that sort may arise between the different claimants; the question whether, inasmuch as such questions may arise, the right to the timber cannot now be determined, deserves great consideration for this reason; if Mrs. Atkyns be not only tenant in fee, but tenant in fee unfettered by any restriction as to timber, this court, by restraining her from cutting it, will to all intents and purposes determine against her; for if she dies leaving the timber standing upon the estate, it will be impossible for her personal representatives to obtain the value of it, unless somehow secured in the meantime. The consequence is, that the case presented to the court is a case in which, as it is said on the one hand, that the court by deciding the right may prejudice persons who may claim after the death of Mrs. Atkyns: it may be said, on the other hand, the court, by forbearing to decide, may destroy the whole benefit of that title, which it may hereafter determine to have been in Mrs. Atkyns, when that determination will be of no avail either to her or her representatives, unless by some particular order, care is taken that it shall be beneficial to her or her representatives. Supposing that it cannot now be decided, whether the right to the timber is in Mrs. Atkyns or not, another question is, whether the court must not, for the purpose of preserving the property, find some principle upon which it can now in some manner or other interpose?

The questions, what interest Mrs. Atkyns takes *in [*156] the estates, and what is the beneficial quality of that interest, have been discussed in various ways; first, it has been insisted that the words "my family" import a description of that individual, who was the heir at law of the testator at the time of his death; if this had been a devise to Mrs. Atkyns for

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life, with remainder to "my family," it would have been a bold step to say that the heir at law of the testator would not have been entitled; whether the cases which have been decided have been rightly decided or not, there are cases in which it has been held that a remainder to "my family" operates as a devise to my heir at law. The court, in its anxiety to find out the meaning of the testator, has found out that what he has said has the same meaning as if he had said nothing at all. With respect to those cases, he must be a bold man who, sitting in a judicial chair, would attempt to disturb them.

Another way of putting this case has been, that this is a devise in fee to Mrs. Atkyns, coupled with a condition; I think it would be difficult to make that out; but, supposing it to be a case of condition, I cannot see how parties can come into a court of equity to prevent the breach of a condition, who are contending that the breach of that condition will give them title; that equity I cannot comprehend. The next supposition has been that the testator has created a power; if it be a power, it must be capable of being exercised amongst different objects, which may be selected out of a class of persons capable of definition, and of being represented with legal certainty. If the case be neither a trust, a condition, or a power, it has been contended that it may be a resulting trust for the heir at law; I think it would be extremely difficult to make that out, unless the court can say it is to be so, if Mrs. Atkyns makes no disposition.

With respect to the matter of trust, I confess I cannot [*157] help thinking that if there is a title in any of these plaintiffs, it must be founded upon the doctrine of trusts; that this is a fee given to Mrs. Atkyns, with an obligation imposed upon her conscience, to dispose of the property (whatever is meant by the words "the property") at her death, to the family of the testator. In order to determine whether the trust is a trust this court will interfere with, it is matter of observation; first, that the words must be imperative, that the words are imperative in this case there can be no doubt; secondly, that the

subject must be certain, and that brings me to the question what is meant by the words "the property;" and thirdly, that the object must be as certain as the subject, and then the question will be, whether the words "my family" have as much of the quality of certainty as this species of trust requires.

Let it be observed that in this case, in the first instance, a fee is given in the estate, and one question, therefore, with respect to the words "the property" is, whether there is any case with respect to a real estate, in which the doctrine of trusts has been carried so far as to enable the court to say, that where an estate in fee is given, the trust shall be considered of so restrictive a nature that the person who is tenant in fee shall not be at liberty, with respect to timber and mines, to treat the estate in the same husbandlike manner as another tenant in fee. It is a different question, whether the existence of such a trust prevents the exercise of ownership which an absolute tenant in fee might exercise over the timber, or whether a tenant in fee, subject to such a trust, may make as much havoc and destruction as a tenant for life without impeachment of waste might do. Another question with respect to the words "the property" is, whether those words mean the soil, and not only the soil, but every stick of timber standing upon the estate, *ultra* that which is necessary for the repairs, and for the ordinary *enjoyment [*158] of the estate; that is a point well worth a great deal of consideration, whenever it shall be necessary to decide it.

The next question is what the words "my family" mean; I doubt whether I should ever have given the construction to those words which has been given to them, but I think every court is now bound by that construction. The question, however, in this case is, whether those words, which, standing unaffected by anything contained in the context, mean the heir at law, may not be qualified by the context; and if so, whether they ought not to be so interpreted. The cases, I apprehend, go the length of showing that the context will affect the construction of words in a will; and if so, another view of the subject

1823.—Wright v. Atkins.

arises, whether it is the context only which can affect the construction, or whether, on the other hand, the purposes of the testator, and the nature of the enjoyment given to the individual in other parts of the will, may not also affect the construction. Now, in this case, the testator gives his estate in fee to his mother, and he expressly gives her a power of disposing by will; it strikes one as a very odd thing to say that the meaning of the testator is not that she shall give to a person whom she is to select out of all the objects which the word *family* will comprehend, but that she is to make a will for the purpose of giving to his heir at law; or to say, that though the testator has given her a power to dispose of the property by her will, he has given it in such a way that the person who is to take must take by his will. I cannot, therefore, help thinking that the words "my family" must have such a construction put upon them, that somebody or other, by force of that construction, joined to the effect of her will, may take by the effect of her will; if so, do the words "my family" import a class of persons, among whom she is to make a selection, capable of such

[*159] precise definition, that it can be said that the objects of this trust are certain. In the course of the argument I suggested the case of a testator creating a power of this kind, having estates coming from different ancestors, estates for instance *ex parte paterna*, *ex parte materna*, copyhold and customary estates descending to different heirs, gavelkind lands and leasehold estates, and I asked who was to be considered as the heir to take those estates under the words "my family," whether the heir at law *ex parte paterna* was to take all the estates, or the different kinds of heirs were to take the different estates, according to the descendible property belonging to them. The *Attorney-General* observed, that if a testator having such estates was to devise to his heir at law, the same difficulties would arise; be it so, then the court must construe the will as well as it could, and must say that the heir takes by descent; and then there would be no difficulty in finding out, if it could be found out with certainty from the will, what heir was to take. If that difficulty can be so answered, still,

1823.—Wright v. Athyna.

in a case where a trust is to be raised, characterized by certainty, the very difficulty of doing it is an argument which goes to a certain extent, I do not say the whole extent, towards inducing the court to say it is not sufficiently clear what the testator intended.

It is contended that the words "my family" must be taken in a popular sense, and that the nature of the disposition shows they are not to be taken in a technical sense; then what is the popular sense of those words? It is remarkable, that in the will of the person who was the heir at law of the testator at the time of his decease, under which the present plaintiffs are suing, there is a bequest to a wife; surely it is a singular thing to state that a wife is no part of one's family, and yet the whole argument clearly shuts out the wife, and not only is the *wife [*160] excluded, but according to the argument, neither father or mother are any part of a man's family. Suppose that this testator had devised to his wife for life, and had imposed upon her the obligation at her death to give to his family, in the same way in which that obligation is imposed or attempted to be imposed by this will, and suppose that the testator died leaving two brothers, and that the wife by her will passed over the eldest brother, and made the next brother tenant for life, with remainder to his first and other sons, charging portions for the children of the eldest brother, and limiting the ultimate remainder to him; I think no one out of this court would say, that that was not giving to the family of the testator.

These are the points which appear to me to surround this case; I am aware that there is considerable difficulty in determining, whether anything can be done till after the death of Mrs. Athyns: but after having very much considered this part of the case, I cannot help thinking, that some steps must be taken by the court even in this stage of the business. I agree that the court ought not to decide at this moment upon the rights of any person, who by anticipation it may suppose may at a future day bring forward questions of right before it, unless the rules of the court (it being ascertained who the parties are that will be entitled),

1823.—Wright v. Atkyns.

will enable it to do so: but in this case it must be remembered, that if the court does not interpose at all, it is negatively deciding the question against one of the parties; for if the court abstains from doing anything, and this lady chooses to act upon the supposition that she has no right to cut the timber, the consequence will be, that if it shall hereafter turn out, upon the question arising amongst other persons, that she had the right to cut the timber, she will have lost the whole value of the timber which she might have cut; and on the other hand, if in [*161] consequence of the refusal of the court to interpose, this lady thinks proper to cut the timber, the consequence will be, that if she dies with assets insufficient to answer the value of the timber she has cut, and it shall hereafter be determined that she had no right to cut any timber at all, she will have got the timber against those who are entitled to it; so that if the court does not interpose to a certain extent, the consequence, as it appears to me, necessarily must be this, that though the court appears to refuse to act, against one or the other it does in effect interpose. The result therefore is, that though the court cannot, at the present time, absolutely decide upon the interests of the parties, it must interpose to the extent of taking care, that whenever the interposition of the court is called for, and can be given, the property shall be in such a state, that the rights of those who may be taken to be, or to have been entitled, may not have been prejudiced.

The cases which have been decided with respect to personal estate seem to afford the principle, that the court may interpose to a certain extent. In *Harding v. Glyn*(a) the testator gave his personal estate to his wife, and he then proceeded in words, which were held to create a trust in favor of his relations; after the death of the testator's wife (how the property had been preserved in the meantime does not appear), a bill was filed by her representative to carry her will into execution; in that case, as in others, the court said, that the word "relations" meant per-

(a) 1 Atk. 469.

1893.—Wright v. Atkyns.

sons who would be entitled according to the Statute of Distributions, but it also said, that the word "relations" in that case did not necessarily mean next of kin, but meant every person who might be a relation. Now the word "relations" is undoubtedly a term that sufficiently describes a class of persons, whether the word "family" does or does not; and part of the personal estate having been given by the testator's wife to [*162] a person who was a relation of the testator, but who was not one of his next of kin, either at his death, or at the death of his wife, it was held, that that part was well given, and that the remainder was distributable amongst those persons who were the next of kin of the testator, not at his death, but at the death of his wife; during the life, therefore, of the testator's wife, it must have been an utter uncertainty, who would ultimately become entitled; the court therefore must have said, either that the testator's wife, who might be wrongfully acting upon the property every moment of her life, should nevertheless be entrusted with it during the whole of her life, or that it would somehow or other interpose in order to preserve the property for those who might take it at her death, with reference to whom not one might be in being till the last hour of her life.

The case of *Pierson v. Garnet*(a) seems to be a little misunderstood, when taken to establish the doctrine, that this court will not interpose in such a case as this; I was counsel for Mr. Pierson in that case, and one great thing we struggled for was, to know to whom he might give the property; indeed my mind was at that time strongly impressed with the notion, that the difficulty of enabling him to know to whom he might give the property, was an objection to the doctrine of trusts being applied at all: but the decision was right enough, for nobody can deny, that the word "descendants" is capable of such a construction, as to show who fell within the class which that word describes; if I am speaking of my descendants who now are, or of my descendants at the time of my death, no person can doubt who they

(a) 2 B. C. C. 38, 226.

 1823.—Wright v. Atkyna.

now are, or who they will be at the time of my death, because they must be persons descended from me. Who is my [*163] family is *another matter. The words "my relations" or "my descendants" are capable of construction: but the words "my family," in a popular sense, go round in such a manner that we can set no limit to them. In that case of *Pierson v. Garnet* it was not necessary for the court to interpose at all, because the property was in the hands of trustees. The bill was brought by Mr. Pierson against the trustees to compel them to hand over the property to him; the court held, that Mr. Pierson had no right to call for the property out of the hands of the trustees, and that was all which it was necessary for the court to do, because the right of Mr. Pierson being negatived, the trustees would preserve the property for those who were to take it.

In the case of *Hands v. Hands(a)* the court did interpose to secure the property, and if the court will not interpose, upon the ground that the right may be controverted on the death of the person in whom such trusts are vested, the consequence appears to me to be, that it is impossible sufficiently to provide for the rights of all parties, who may be interested on the death of such persons.

My opinion therefore is, that the defendants should be at liberty to cut the timber, in a husbandlike manner, giving security for the value, or bringing the value into court; and I cannot help thinking, that it is a question upon which I should hesitate a long time, before I should go the length of saying that the person who has the fee given in this sort of way, is not entitled to cut down timber in a husbandlike manner, as a tenant in fee in the ordinary management of the property might do. That is the strong inclination of my mind: but at the same time in a case of this kind I will not go farther than to say, that where a decision, which is to bind others, can only [*164] *be made hereafter, it is the duty of the court in the

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meantime to keep the property in such a state, that when it is made out who are the objects of favorable decision, they may have the benefit of it.

The following are the minutes of the order made by the Lord Chancellor:—

Let the defendants Charlotte Atkyns, Elizabeth Berney and Thomas Trench Berney be at liberty to cut down the timber standing and growing upon the premises in question in this cause, in a husbandlike manner, as tenant in fee, giving the plaintiffs an account of what is felled. And let the said defendants Charlotte Atkyns, Elizabeth Berney and Thomas Trench Berney pay the money to arise by sale of the said timber (the amount to be verified by affidavit) into the bank, with the privity of the Accountant-General of this court, to be there placed to the credit of this cause; and let the said defendants Charlotte Atkyns, Elizabeth Berney and Thomas Trench Berney be at liberty to apply to this court for more enlarged powers of cutting the said timber; and let any agent to be appointed by the plaintiffs have liberty from time to time to attend, and see that the cutting of the timber is proper according to the meaning of this order. And let the plaintiffs be at liberty to apply to this court as they may be advised. And let the said defendants Charlotte Atkyns, Elizabeth Berney and Thomas Trench Berney be at liberty to apply to this court to have the said money paid out to them, upon giving security for the same; and let the said defendants Charlotte Atkyns, Elizabeth Berney and Thomas Trench Berney be at liberty to appeal from this order to the House of Lords, notwithstanding they act under the same. And this court does not think fit to make any other order as to the injunction prayed in this cause.

1823.—Harris v. Harris.

[*165] *GEORGE HARRIS v. HENRY HARRIS.

HENRY HARRIS v. GEORGE HARRIS.

1823: 27th February; 1st, 4th and 6th March; 3d May.

If a bill and cross bill be filed, the plaintiff in the original bill has a right to the first answer, and may move to stay proceedings in the cross cause till the original bill is answered, though the plaintiff in the cross bill may be in a situation to enforce an answer first.

The right of the plaintiff in the original bill to make the motion, was held not to have been waived by his having taken out the common orders for a time to answer the cross bill.

GEORGE HARRIS filed his original bill against Henry Harris on the 4th of April, 1822, but in consequence of a difficulty in finding the defendant, the *subpoena* was not served until the 23d of September, and was not returnable until the 6th of November following; Henry Harris filed a cross bill against George Harris on the ensuing 8th of November. George Harris took out two orders for time to answer the cross bill, and Henry Harris also took out orders for time to answer the original bill; but the original cause being a country cause, and the cross cause a town cause, Henry Harris would have been in a situation to compel an answer to the cross bill, before George Harris could have enforced an answer to the original bill. A motion was therefore made on the part of George Harris, that the proceedings in the cross cause might be stayed, till Henry Harris, the plaintiff in that cause, should have fully answered the original bill. The motion had been made before the Vice-Chancellor, and refused.

Mr. *Heald* and Mr. *Glyn*, in support of the motion, contended that although the plaintiff in the cross suit might be in a situation to call for an answer first, the plaintiff in the original suit had a right to the first answer as the reward of his superior diligence in the institution of the suit; and that he did not waive his priority by taking out orders for time to answer the cross bill.

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Mr. *Shadwell*, against the motion.

*THE LORD CHANCELLOR:—Cases may happen, in [*166] which the plaintiff in the original suit may suppose that he can put in his answer in the cross suit, before the expiration of the orders for time, without suffering any prejudice from not insisting upon the original bill being first answered. It is difficult to say that taking out orders for time amounts to an absolute waiver of the right to the first answer. It does not occur to me that the point has ever arisen, and I should wish, therefore, to be furnished with the opinion of the registrars—whether where the original cause is a country cause, and the cross cause a town cause, the same right of priority obtains as where both causes are of the same description? and whether the plaintiff in the original suit waives his priority by taking out orders for time to answer in the cross suit.

March 4th.—The LORD CHANCELLOR mentioned this motion, and said that according to the practice of the court, George Harris had the right to call upon Henry Harris to put in his answer first, and that the question was whether he had waived that right?

March 6th.—THE LORD CHANCELLOR:—In this case it was originally represented to me, that the Vice-Chancellor upon the certificate of the registrars, had decided that the plaintiff in the original suit, by moving in the cross suit for a month's time to answer, waived the right to move that he should have a month's time to answer the cross bill, after the answer was put in to the original bill. It turns out that that was a mistaken representation, and that the communication to the Vice-Chancellor was made by some of the six clerks;—the registrars are divided in opinion upon the point, and so far are the six clerks from being agreed upon it, that *they will not issue process [*167] under such circumstances. It does not appear to me at all inconsistent with the present motion, that the plaintiff in the original suit has asked for the usual orders for time to answer in

 1823.—*Burges v. Mawbey.*

the cross suit; he may have given the defendant credit for diligence; it is clear he might have made this application before he took out the common orders for time—is he then to be excluded from it because he has been more reasonable in the first instance? No decision is to be found upon the point.

May 3d.—The LORD CHANCELLOR said he did not think that any step taken in the cross suit prevented the right to call for an answer in the original suit, and granted the motion.

BURGES v. MAWBEY.

ROLLS.—1823: 5th May.

An infant tenant in tail is bound to keep down the interest of debts charged upon the entailed estates.

A tenant for life was also held to have been liable to keep down the interest of the debts, although, having the ultimate remainder in fee, he had consented to an Act of Parliament, by which the estates were vested in trustees for the payment of the debts.

Tenant for life is bound to keep down the interest of debts, but being an heir at law not otherwise provided for, is, as against the remainder-man, entitled to maintenance.

SIR JOSEPH MAWBEY being seised of certain freehold and copyhold estates, subject to various charges thereon, and to the payment of several annuities, by his will, dated the 11th of October, 1792, gave and devised the same to the use of Thomas Wood and Maurice Swabey, their executors, administrators and assigns for the term of 500 years, upon trust to raise money for the payment of certain portions to his children, and also, if necessary, for the payment of his debts and legacies, and, after the determination of the said term of 500 years, the said [*168] *testator devised the premises to the use of his son, Joseph Mawbey, for life, remainder to trustees and their heirs during his life to preserve contingent remainders, re-

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mainder to the use of the first and other sons of the said Joseph Mawbey, the son successively in tail male, remainder to the use of any other son or sons of the said testator by any future wife successively in tail male, remainder to the use of the first and other daughters of the said Joseph Mawbey, the son according to seniority in tail male, remainder (after divers interposed estates tail to other persons) to the use of the heirs of the said testator's own body, with divers remainders to other persons in tail, with the ultimate remainder to the said testator's own right heirs forever.

The testator, by a codicil to his will, appointed his son, the said Joseph Mawbey, his sole executor, and on the 16th of June, 1798, he died, leaving the said Joseph Mawbey, the son, who then became Sir Joseph Mawbey, his heir at law.

Upon the death of the testator, Sir Joseph Mawbey, the son, proved his will, and entered into possession of the devised estates, and shortly afterwards some of the creditors of the testator filed a bill to carry into execution the trusts of his will, and to have the usual accounts taken of his personal estate, and of the rents and profits of the estates comprised in the term of 500 years, and in the event of the personal estate proving insufficient for the payment of the testator's debts, then to have the deficiency raised by mortgage or sale of the premises comprised in the aforesaid term.

By the decree made upon the hearing of the cause, on the 2d of May, 1798, the will of the testator was established, the accounts prayed by the bill were directed, and it was ordered that, in case the personal estate of the *testator [*169] should not be sufficient for the payment of his debts, the Master should inquire whether the deficiency could be raised by sale or mortgage of the premises comprised in the said term of 500 years.

On the 18th of June, 1804, the Master made his report, and thereby certified that there would be a deficiency of the testa-

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tor's personal estate for the payment of his debts, to the amount of 45,000*l.* or thereabouts; and that he was of opinion that such deficiency could not be raised by sale or mortgage of the premises comprised in the term, and he submitted to the court that such deficiency could not be raised without the interposition of the legislature, authorizing a sale of the fee simple of such parts of the testator's estates as would be sufficient for raising such deficiency.

The cause was heard on further directions on the 4th of December, 1804, and was then ordered to stand over until an application should be made for an Act of Parliament, for authorizing a sale of the fee simple of the testator's estates comprised in the term of 500 years, or so much thereof as should be necessary for raising so much money as the testator's personal estate should be deficient for the payment of his debts and legacies. An Act of Parliament was accordingly obtained in the year 1805, by which the estates comprised in the said term were vested in the same said Thomas Wood and Maurice Swabey and their heirs upon trust to sell; and it was enacted that the purchase moneys should be paid into the bank, to be applied under the direction of the Court of Chancery, in satisfaction of the claims and demands upon the estate of the testator.

Previous to the month of August, 1808, a large portion of the debts due from the testator were paid off, partly by Sir [*170] *Joseph Mawbey, the son, out of his own moneys, and partly by means of a sale made under the aforesaid Act of Parliament; and on the 10th of August, 1808, an order was made in the cause, upon the petition of the plaintiffs, whereby, amongst other things, it was ordered that the Master should inquire and state to the court what was due to Sir Joseph Mawbey, the son, in respect of interest paid by him on any of the said testator's debts, or on account of the debts of the testator paid by him or otherwise; and it was further ordered that the said Sir Joseph Mawbey, the son, should be admitted a creditor on the testator's estate for so much as should appear due to him as aforesaid, and

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that so much of the estates comprised in the said Act of Parliament, as should be necessary for the purpose of paying what should be found due to him, the said Sir Joseph Mawbey, the son, should be sold pursuant to the said Act.

Before any proceedings under this order were completed, and on the 27th of August, 1817, Sir Joseph Mawbey, the son, died, without ever having had any male issue, leaving two daughters only, Emily Mawbey and Anna Maria Mawbey, and having by a codicil to his will appointed his wife, Lady Mawbey, to be his sole executrix. Upon the death of Sir Joseph Mawbey, the son, Emily, his eldest daughter (who was then an infant), became tenant in tail of the devised estates; she died on the 25th of March, 1819, without having been married, and before she attained the age of twenty-one years. Upon her death, her sister, Anna Maria Mawbey, became tenant in tail of the said estates; she intermarried with John Ivatt Brisco on the 25th of September, 1819, and attained her age of twenty-one years on the 25th of March, 1822.

Subsequently to the order of the 10th of August, 1808, other sales were made under the aforesaid Act of Parliament; *and parts of the purchase moneys arising therefrom [*171] were received by the said Sir Joseph Mawbey, the son, in his lifetime, and by the said Lady Mawbey after his decease.

The original cause was revived after the death of Sir Joseph Mawbey the son, and by a decretal order, dated the 12th of March, 1821, it was amongst other things ordered, ~~that~~ the Master should inquire and state to the court, what was due to Lady Mawbey, the executrix of the said Sir Joseph Mawbey the son, in respect of interest paid by her, or the said Sir Joseph Mawbey the son, on any of the debts of the said Sir Joseph Mawbey the elder, or in discharge of the principal of such debts; and it was ordered, that the said Lady Mawbey should be at liberty to retain the purchase moneys received by her, and by the said Sir Joseph Mawbey the son, as aforesaid, in part satisfaction of what

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the Master should find due to her from the estate of the said Sir Joseph Mawbey the father, and that she should be admitted a creditor on the estate of the said Sir Joseph Mawbey the father, for so much as the said Master should find to be due to her; and it was further ordered, that so much of the estates comprised in the said Act of Parliament, as would be sufficient to raise what should be found due to Lady Mawbey, should be sold, pursuant to the said Act.

The Master made his report, in pursuance of the said decretal order, on the 1st of June, 1821; and the report was absolutely confirmed by an order dated the 3d of the same month of June.

The cause now came on upon a petition of rehearing, presented by the said John Ivatt Brisco and Anna Maria his wife; the petition stated that the petitioners were advised, that the said Sir Joseph Mawbey the son, as tenant for life of [*172] the said estates, was bound during his *life, and that the said Emily Mawbey his eldest daughter, as tenant in tail of the said estates, was bound during her life, to pay and keep down the interest of the debts of the said Sir Joseph Mawbey the father, which by his will were charged upon the said estates and premises; and that, therefore, so much of the said order of the 10th of August, 1808, as directed that the Master should inquire and state to the court what was due to Sir Joseph Mawbey the son, in respect of interest paid by him on any of the said testator's debts, was erroneous, and that so much of the said decretal order of the 12th of March, 1821, as directed that the said Master should inquire and state to the court what was due to Lady Mawbey in respect of interest paid by her, or by the said Sir Joseph Mawbey the son, on any of the debts of the said Sir Joseph Mawbey the father, it was in like manner erroneous.

The petition then proceeded to state, that it appeared by the Master's report of the 1st of June, 1821, that Lady Mawbey had been admitted a creditor for 6,850*l.* in respect of interest upon

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the debts of the said Sir Joseph Mawbey the father, paid by the said Sir Joseph Mawbey the son, or by her the said Lady Mawbey after his decease, and insisted, that the said sum of 6,850*l.* ought to have been paid out of the rents and profits of the said estates, received by or on the behalf of the said Sir Joseph Mawbey the son, during his life, and of the said Emily Mawbey after his death, and ought not to be charged upon, or to be raised by sale of the said estates.

The petition therefore prayed, that the order of the 3d of June, 1821, confirming the Master's said report, might be discharged; and that the cause might be reheard, as to so much of the decrees of the 10th of August, 1808, and the 12th of March, 1821, as was thereinbefore complained of, and as to the allowance to Lady Mawbey of interest paid or accrued upon the debts of Sir Joseph *Mawbey the father, at any time before [*173] the death of the said Emily Mawbey; and that the Master might be directed to review his report of the 1st of June, 1821, as to such allowance of interest.*(a)*

Mr. *Sugden* and Mr. *Bickersteth* for the petitioners.

Mr. *Agar* and Mr. *Moore* for Lady Mawbey.

The MASTER OF THE ROLLS, after recapitulating the facts of the case, and observing that the will of Sir Joseph Mawbey the father was imperfectly set out in the pleadings, and that it contained a recital of a settlement, by which it appeared that Sir Joseph Mawbey the son had considerable other property, besides the estates which formed the subject of the suit, proceeded in the following manner.

This cause has been reheard by the consent of the parties, for the sake of obtaining the opinion of the court, as to the principle

(a) There was no representative of Emily Mawbey before the court, but upon Lady Mawbey's undertaking to take out administration to her, the cause was permitted to proceed.

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upon which the accounts should be taken. The petitioners contend, that Sir Joseph Mawbey the son, as tenant for life, and his eldest daughter, as tenant in tail, were respectively bound to keep down the interest of the debts. The questions, therefore, affect, first the tenant for life, secondly, the tenant in tail.

First, with respect to Sir Joseph Mawbey the son, tenant for life; it is not contended, that if he had paid the principal of the debts, he would not have been a creditor on the estate *pro tanto*; but it is said, that in paying the interest, he only did what he was bound to do, and, therefore, had no claim to charge [*174] the estate for the interest *which he so paid. One thing is quite clear, that as between the tenant for life, and the creditors, there could be no question; the creditors might take the whole of the rents and profits; whatever right the tenant for life has to any part of them, arises from the equity subsisting between him and the remainder-man. The principle is clear, the tenant for life is bound to keep down the interest of the debts, beyond that, as between him and the remainder-man, he is bound to do nothing; and after paying the creditors the interest of their debts, he may put the surplus of the rents and profits into his own pocket. It would be quite idle, at this time of day, to cite authorities in support of that principle; it is taken for granted in all the cases, from Lord Hardwicke down to the present time. *Revel v. Watkinson*, (a) *Tracy v. Hereford*, (b) *Lord Penrhyn v. Hughes*, (c) *Bertie v. Lord Abingdon*. (d) Generally speaking, therefore, it is perfectly clear, that the tenant for life is bound to keep down the interest; it has been attempted, however, to distinguish this case by two circumstances; first it is said, that Sir J. Mawbey the son was not bare tenant for life, but having the ultimate remainder in fee, and consenting to the Act of Parliament, he was entitled to favor. The answer to that argument is, that his ultimate remainder in fee was worth nothing; the estate was given to so many intermediate persons in tail, that

(a) 1 Ves. 93.

(b) 2 Bro. 129.

(c) 5 Ves. 99.

(d) 3 Meriv. 660.

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the ultimate remainder could add no value to his life estate. The second ground upon which it has been argued that Sir Joseph Mawbey the son was entitled to favor is, that being the eldest son, he was entitled to maintenance as against the remainder-man; it is perfectly clear, that the heir at law, not otherwise provided for, is, as against the remainder-man, entitled to a provision; but it is not stated in any part of the pleadings, that Sir Joseph Mawbey the son was unprovided for, nor is there the least shadow of a *ground even for an inquiry as to [*175] that point. These two grounds then failing, this is no more than the ordinary case of tenant for life, bound to keep down the interest, and the decree complained of is so far erroneous.

The second question respects a smaller sum, but is a question of more difficulty; Emily Mawbey, the eldest daughter of Sir Joseph Mawbey, succeeded to him, and enjoyed the estates for two years, during all which time she was an infant. The question is, whether she was bound to keep down the interest of the debts. It is of great importance to settle the point, as it is one which may frequently arise; there is an opposition of great authorities on the subject; of Lord Talbot in 1734, and Lord Hardwicke in 1742, but after carefully looking at the case, I have satisfied my own mind that there can be no doubt.

First as to the principle. The ground why an adult tenant in tail is not bound to keep down the interest of debts is, because he is in fact the owner of the estate, and the remainder-man is at his mercy. Against an adult tenant in tail, therefore, the remainder-man has no equity. The question is only as to an infant tenant in tail. Now as to the power of an infant tenant in tail to suffer a recovery, it has been said, that he may obtain a privy seal to enable him to do so; as a matter of curiosity I have looked into this subject; it is a singular mode of application to the king, for a recommendation to the judges of the Court of Common Pleas, to permit the infant to suffer a recovery; yet it is laid down, that it is at the discretion of the judges whether

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they will permit it; and it is a question whether such a recovery is not reversible in error. In 2 *Salk.* 567, Sir *J. St. Albans'* Case, several precedents were cited; but the judges dis-
 [*176] allowed the privy seal.(a) *That is the latest authority on the subject, and in Mr. Cruise's Digest(b) it is stated, that the practice of privy seals is now disused, and that private Acts of Parliament are universally substituted in their stead.(c) If, therefore, the principle is, that an adult tenant in tail is favored, because he can make the estate his own, an infant tenant in tail cannot be put upon the same footing, because he cannot make the estate his own.

Next with respect to authorities; they are directly to the contrary; the first indeed is *prima facie* in favor of the infant: it is that of *Chaplin v. Chaplin*(d) by Lord Talbot. The expressions of Lord Talbot are general, nor does he advert to the distinction between adults and infants tenants in tail, but it was the case of an infant. Opposed however to that case is another by Lord Hardwicke, which is exactly in point; *Sergison v. Sealey*(e) has always been considered a leading case on the subject, and as forming the rule upon which the court is to proceed; there are a diversity of reports of that case; the report in Atkyns is deficient in dates and circumstances, which have been supplied in a great measure by Mr. Sanders from the registrar's books. I thought, however, that it would be a satisfaction to the bar to ascertain the correctness of that case from the notes of Lord Hardwicke. I therefore applied to the present Lord Hardwicke, and although I have not been able to obtain any note by Lord Hardwicke himself, I have been favored by his family with two MSS. reports of the case. I have compared these reports with Mr. Sanders' extracts from the registrar's book, and find that they correspond nearly as to dates, and exactly as to family. In

(a) See 1 *Ld. Raym.* 113. *Lord Newport v. Sir Henry Mildmay*, Cro. Car. 307.

(b) Vol. V. 432.

(c) That the practice of privy seals, although disused, is still to be considered as part of the law of the land. See *Doe v. Rauding*, 2 B. and A. 441.

(d) 3 P. Wms. 229.

(e) 2 Atk. 416.

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one thing all the reports concur, namely, that Lord Hardwicke did *apply the rents and profits to keep down the [*177] interest. This case, and that of *Chaplin v. Chaplin*, are mentioned in several cases. In *Amesbury v. Brown*,(a) though on a different question, Lord Hardwicke adverts to both these cases; after mentioning the case of *Sergison v. Cruise*, which is the same case as *Sergison v. Sealey*, he adds, "*Chaplin v. Chaplin* is said to be determined differently; but I do not know whether they agree in circumstances, which may make a difference." So that he does not seem to think that his own decision was at all broken in upon. In *Jones v. Morgan*(b) the general doctrine as laid down by Lord Hardwicke is recognized by Lord Thurlow, and in *Ware v. Polhill*(c) Lord Eldon states the rule in the same way. In *Bertie v. Lord Abingdon*(d) it is well known that the question arose between the real and personal representatives between whom there could be no equity, but the Master of the Rolls says, "there could be no question as to the obligation of an infant tenant in tail to keep down the interest as against the remainder-man."

Under this review of the subject, the case of *Sergison v. Sealey* has not been shaken, and therefore must govern this. Lord Hardwicke in adverting to the case of *Chaplin v. Chaplin*, said there might be a difference of circumstances; I think there is, though a very slight one. The infant tenant in tail, having suffered the interest to fall into arrear, died just before he came of age, leaving a personal estate, and Lord Talbot was asked to order the executors to pay the arrears out of the personal estate. Lord Talbot refused to do it. And in *Sergison v. Sealey* Lord Hardwicke said, that the interest should not be paid out of the personal estate, but that the rents and profits were the fund out of which the guardian should have paid the interest. If that does not reconcile these two cases, I think the point is decided by *Sergison v. *Sealey*. The petitioners have, [*178]

(a) 1 Ves. 479.

(c) 11 Ves. 257.

(b) 1 Bro. 200.

(d) 3 Meriv. 500.

1823.—*Stevens v. Guppy.*

therefore, made out both their grounds. The direction as to the tenant for life and his infant daughter were both irregular; and the mother and guardian of the daughter ought to have applied the rents and profits, in keeping down the interest of the debts.

STEVENS *v.* GUPPY.

1823: 6th May.

Where the enrollment of a decree is gained by surprise, the court will vacate it.

MR. LOVAT on the part of the plaintiff, moved to vacate the enrollment of the decree pronounced at the Rolls in this cause, under the following circumstances, which appeared upon admissions made by the solicitors of both parties.

On the 30th of March, 1822, the decree was pronounced, and on the 6th of December in the same year, the plaintiff presented a petition of rehearing; the order for rehearing was dated on the following day, and was entered with the registrar and served upon the 12th of December. The decree was enrolled upon the 10th of December. Previous to the month of December, several conversations had taken place between the solicitors of the plaintiff and defendant, in which intimation had been given of the plaintiff's intention to appeal from the decree, and in a conversation which passed a few days before the petition of rehearing was presented, the solicitor for the plaintiff had informed the solicitor of the defendant, that the petition was prepared, to which the latter had answered by desiring that no time might be lost in presenting it.

[*179] *The motion was made for the purpose of letting in the plaintiff to appeal from the decree, which was pronounced upon the merits.

Mr. *Lovat* in support of the motion, argued that where the enrollment of a decree was a surprise upon the opposite party,

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the court would vacate it, and cited *Kemp v. Squire*,^(a) Anon. 1 Vern. 131.

Mr. *Romilly* against the motion, insisted that the enrollment of a decree could only be prevented by a *caveat* being entered, and that even if a case of surprise was made out, the court would not vacate the enrollment where the decree was made upon the merits. *Charman v. Charman*.^(b)

THE LORD CHANCELLOR :—It is not attempted to be intimated that there is any intention of delay on the part of the plaintiff; I have no difficulty in saying that it is a surprise, if the party enrolling the decree has said that which might lead the other party to believe that the decree would not be enrolled.

The order was made for vacating the enrollment.

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[*180]

ROLLS.—1823: 29th April and 6th May.

Feme sole makes a mortgage, and afterwards marries; the mortgage is then transferred, and the husband joins in the transfer, and covenants to pay the money. During the coverture, the husband, by gradual payments out of his own property, reduces the money due upon the mortgage; by his will he makes a disposition of the mortgaged premises, and dies in the lifetime of his wife; upon a bill by the wife, who claimed to be entitled by survivorship to redeem the mortgage, the redemption was decreed upon the terms, that the husband's estate should stand in the place of the mortgagee, for the sums paid by him out of his own property in reduction of the mortgage debt.

In all cases where money is paid off by individuals not having an absolute permanent interest in the premises, the court looks at the intention.

In the month of June, 1784, the plaintiff, who was then unmarried, assigned a leasehold house, to which she was entitled for the residue of a term of 98 years, to Henry Maddock by way

^(a) 1 Ves. Sen. 205.

^(b) 16 Ves. 115.

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of mortgage for securing the sum of 220*l.* and interest; in 1797, the plaintiff intermarried with John Pitt, and in November, 1809, by an indenture of that date, made between Elizabeth Robinson (in whom the mortgage was then vested) of the first part, John Pitt and the plaintiff his wife of the second part, and Sarah Fullwell of the third part, the mortgaged premises were assigned to Sarah Fullwell, for the then residue of the said term of 98 years, subject to redemption on payment by John Pitt and the plaintiff his wife, or their executors, administrators and assigns, to Sarah Fullwell, her executors, administrators or assigns, of the said sum of 220*l.* and interest; it did not appear by the pleadings, but it was admitted at the bar, that this indenture contained a covenant by John Pitt for the repayment of the mortgage money. John Pitt died in October, 1820, and by his will, dated on the 19th of that month, appointed the plaintiff and John Pitt one of the defendants to be his executors, and disposed of the mortgaged premises, and of the general residue of his personal estate in the following terms: "I give my leasehold house wherein I reside, and all my effects and personal estate whatsoever, unto my wife during the term of her natural life, subject as to my said house to such sum of money as shall be due on the security thereof, and to the rents and covenants contained in the original lease thereof; and after her decease, I give my said leasehold house and personal estate to all my children, equally to be divided between them." During the coverture several payments [*181] were made by the *husband out of his own property, which effected a considerable reduction in the money due upon the mortgage.

The plaintiff, stating these facts, and alleging by the bill that 17 guineas only remained due upon the mortgage, insisted, that upon the death of her husband, the leasehold premises in question survived to her as her absolute property, and prayed that it might be declared that she was alone entitled to the said leasehold premises, or to the equity of redemption thereof, and that she might be let in to redeem the same upon payment of what, upon an account to be taken, should be found to be due for prin-

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cipal and interest on the mortgage, and that the said leasehold premises might be re-assigned, and the deeds relating thereto delivered up to her accordingly.

The defendants John Pitt and Lucy Pitt, Sarah Pitt and Diana Pitt, the children of the testator John Pitt, by their answer submitted, that the testator having out of his own proper moneys paid off the whole of the mortgage money, excepting the sum of 17*l.* 17*s.*, the plaintiff did not become entitled by survivorship to the said leasehold premises, or the equity of redemption thereof, as her own absolute property, but only to an estate for life therein under the will of the said testator, and that the acts done by the testator amounted to a reduction into possession of the mortgaged premises; but in case the court should be of opinion that the plaintiff was entitled to the mortgaged premises by way of survivorship, they submitted, that as the children of the testator, they were entitled to stand in the place of the mortgagees of the premises, for such part of the mortgage money as the testator should be found to have paid off.

The mortgagees stated in their answer that they were willing to be redeemed, but that they had received a notice from the children of the testator, alleging that he had *reduced [*182] the mortgage into possession, and was the absolute owner of it, and that they had the right to redeem.

In June, 1822, a decree was pronounced, by which it was declared that the plaintiff was entitled to redeem, and an account was directed. The cause now came on to be reheard by the consent of the parties.

Mr. *Roupell* for the plaintiff:—As the husband had the absolute interest in the equity of redemption, subject only to the wife's claim by survivorship, he must be considered to have paid off the incumbrance for the benefit of the estate; the case is analogous to that of a tenant in tail paying off an incumbrance, which is an equivocal act, and the law presumes that he does so for the benefit of the estate, till the contrary is shown by some declaration of his intention to keep the charge subsisting.

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Mr. *Norton*, for the defendants the children of the testator, cited *Kirkham v. Smith*,^(a) *Bagot v. Oughton*,^(b) and *Lewis v. Nougles*.^(c)

THE MASTER OF THE ROLLS :—The defendants have not persevered in resisting the right of the plaintiff to redeem, or in insisting, as they did by the pleadings, that acts were done by the husband in his lifetime sufficient to reduce this chattel into possession: but they have contended, that admitting no act was done by the husband sufficient to reduce this chattel into possession, there is still an equity on the part of his estate [*183] to be reimbursed the payments made in his lifetime *in reduction of the mortgage debt. The mortgage money was reduced by advances made by the husband out of his own property, and by gradual payments he effected the reduction stated in the pleadings. Then comes the question—for what purpose did he do this? Because in all cases where money is paid off by individuals, not having an absolute, permanent interest in the premises, the court looks at the intention; for instance, where a tenant in tail pays off an incumbrance, *prima facie* he is considered as disincumbering the estate, but still the court thinks itself at liberty to look at the intention. In *Kirkham v. Smith* the tenant in tail had paid off a charge upon the estate amounting to 5,800*l.*; he had taken no assignment of the debt, and there was nothing distinctly to show any intention on his part to keep alive the charge, and yet, he having considered the estate as his own, the court took upon itself to say he ought to be reimbursed; that is a strong case to show what is the criterion of the intention. In this case consider the situation of the husband: he had not the absolute interest in the property, he was not sure that it would become his own, but it may fairly be inferred from his will, that he had persuaded himself that it was his own; his will leads one strongly to believe that there was an impression upon his mind that he had done sufficient to

(a) 1 Vez. 258.

(c) *Ambl.* 159.

(b) 1 P. Wms. 347.

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render this, which was once the chattel of his wife, his own; if he had survived he would have had it absolutely, but he dying in the lifetime of his wife she became entitled; the question is—what under these circumstances is the true equity? It is said that by the marriage the wife's debt was transferred to the husband, and in the next place, that he has, by covenant, imposed upon himself the obligation to pay; with respect to the last point, the case of *Bagot v. Oughton* shows that the covenant to pay is not decisive; that case is not exactly similar to the present, because there the question was—whether payment of the mortgage money out of the husband's assets could be compelled, here the party is *filing a bill to redeem, [*184] and it is insisted, that coming to redeem, she ought to do equity, and consider what her original right was, and that it was by her husband's acts that this mortgage money was reduced. I have not been able to find any direct case in point, but upon the general principle which I have stated, I think there is sufficient to authorize the court to say, that this family should be permitted to have the benefit of the sum which the husband has paid out of his own estate, and that the redemption ought to be upon the terms, that the family be permitted to stand in the place of the mortgagee, for the amount in which the husband has reduced the debt.

 FARQUHARSON v. BALFOUR.

1822.—20th November. 1823: 23d January and 6th May.

A defendant who has put in three insufficient answers, and is in custody for want of a fourth, is entitled to his discharge immediately on filing the fourth answer. After a fourth answer reported insufficient, it is a motion of course, that the defendant shall be examined upon interrogatories and stand committed.

The interrogatories are to be settled by the Master, and must go directly to the points to which the exceptions are sustained.

The defendant, instead of putting in a written examination to the interrogatories, is to be examined personally upon them by the Master.

Exceptions to the Master's report of the insufficiency of a fourth answer, ordered to

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be heard immediately, upon the terms of the defendant's rendering himself amenable to process.

Sufficiency of a fourth answer to be decided upon, not by looking at the fourth answer only, but by looking at it, connected and taken with the three preceding answers.

Where a defendant admits books in the West Indies, to be in his possession, custody or power, the court will order him to bring them here within a reasonable time, and if they are not brought, will consider it the same as if he had them here in the first instance, and refused to produce them.

Papers belonging to a defendant are in his possession, custody or power, although they may be in the West Indies.

The ordinary rule of the court in cases of contempt is, that there shall be a personal examination of the party.

The defendant may be attended by counsel upon his examination before the Master. Personal examination in equity is not analogous to the *viva voce* examination of a witness.

Mode of conducting the personal examination of a defendant upon interrogatories after a fourth insufficient answer.

The defendant is not to be discharged out of custody, upon the Master's report of the sufficiency of his examination, till the plaintiff has seen the examination.

The object of the court, in directing the defendant to be examined upon interrogatories is, that upon that examination, he shall not be liberated out of custody, till he has given a sufficient answer not only to the questions contained in the bill, to which he has not before answered, but to every question which the Master thinks may fairly arise out of the matter, which may be contained in the answers to those questions, without putting the plaintiff to the trouble of amending his bill.

The plaintiff has no right to notice of the defendant's examination.

Seemle, The proper mode of discussing the insufficiency of the defendant's examination is, upon the old exceptions, with respect to any of the original interrogatories in the bill remaining unanswered, and upon new exceptions, with respect to any new questions, which the Master may have introduced in settling the interrogatories. The insufficiency of the examination, however, was in this case permitted to be shown as a cause against the defendant's discharge.

An examination may be quite sufficient, though it is untrue, and inconsistent with what has been sworn by the defendant in his answers.

The principle of the court is, that the plaintiff must be satisfied, with what the conscience of the defendant allows him to swear.

THE bill in this cause prayed, that the plaintiff might be let in to redeem certain plantations and estates in the West Indies, of which it was represented that the defendant had been for a long time in possession as mortgagee, and it called for a discovery of the deeds, accounts, books of account, invoices, bills of lading, plantation books, letters, notes, memorandums, papers and

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writings, relating to the mortgaged premises, and the crops and produce thereof, and the consignments made therefrom, and required the defendant to set forth, whether he had the same then, and if not then, whether he had the same formerly, and if formerly, when last in his possession, custody or power.

*The defendant, by his first answer, stated that by [*185] indentures of lease and release, dated respectively the 5th and 6th of April, 1799, he conveyed the plantations and estates in question, to the plaintiff and his then partners in trade, in consideration of 120,000*l.*, payable by several instalments, and that by other indentures of lease and release, dated respectively the 9th and 10th of the same month of April, the said plaintiff and his partners, reconveyed the same plantations and estates to him the defendant in fee, by way of mortgage for securing the due payment of the said several instalments. The defendant further stated, that the plaintiff and his partners paid the first instalment of the purchase money, but that not finding it convenient to pay the remaining instalments, they entered into an agreement with the defendant, by which it was provided, that he should take back the plantations and estates, repaying to the plaintiff and his partners the money which they had expended thereon, and refunding the instalment of the purchase money which had been paid; and the defendant stated, that in pursuance of the said agreement, the said plantations and estates were, by indentures of lease and release, dated respectively the 23d and 24th of May, 1800, absolutely reconveyed to him, the defendant, in fee. After further stating, that the amount of the moneys to be paid by him to the plaintiff and his partners, and the adjustment and settlement of the accounts between them, was ultimately referred to the decision of arbitrators, and that he had long since paid the sum awarded to be due from him to the plaintiff and his partners; the defendant insisted that he ought to be considered as the absolute owner of the said plantations and estates, and that he was not bound, and ought not to be compelled, to set forth or produce any account of the pro-

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ceeds, profits or produce thereof, or any of the deeds, papers or writings relating thereto.

Exceptions were taken to this answer, upon the [*186] ground *that the defendant had not fully answered the interrogatories contained in the bill as to the deeds, accounts, &c.; the exceptions were allowed by the Master, and exceptions taken by the defendant to the Master's report were overruled by the court.

The defendant then put in a second answer, in which he again submitted to the court that he was not bound to give the information required by the bill, and by the exceptions to the first answer; the second answer was referred back to the Master upon the old exceptions, which, after having been allowed by the Master, were submitted to by the defendant.

A third answer was then put in by the defendant, in which he admitted that he had in his possession, custody or power, divers plantation accounts, letter books, letters, notes, memoranda, papers and writings, relating to the plantations, crops, produce and consignments in the bill mentioned, the particulars of which he set forth in a schedule annexed to the answer. The defendant further stated, that he believed that a great number of books of account, accounts, invoices, bills of lading, plantation books, letters, notes, memoranda, papers and writings, relating in the whole or in part to the said plantations, crops, produce and consignments, were then in the island of Tobago in the West Indies, but he did not state whether the last-mentioned documents were or were not, or had or had not been, in his possession, custody or power, and he also omitted to state, when certain other deeds and papers, which were impliedly admitted to have been in his possession, custody or power, were last in his possession, custody or power.

The third answer having been referred for insufficiency, upon the exceptions taken to the first answer, was reported insuffi-

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cient; and the defendant was then taken into custody *upon an attachment for want of an answer; he then [*187] put in a fourth answer, in which he again omitted to state when last he had possession of certain title deeds, admitted to have been formerly in his possession; and in another part of the fourth answer, he denied that the West India papers mentioned in his former answer, which he admitted were belonging to him, were in his possession, custody or power, because they were then coming over to this country.

Immediately upon the fourth answer being filed, Mr. *E. R. Daniel* moved, before the Vice-Chancellor, that the defendant might be discharged out of custody. The motion was not made upon notice, but it was opposed, on behalf of the plaintiff, by Mr. *Agar*, upon the authority of an order of court of the 30th of April, 1700,(a) which provides that from thenceforth no plaintiff shall be put to prosecute a defendant for a fourth answer, but that after a third answer reported insufficient, every defendant shall be examined upon interrogatories to the points reported insufficient, and shall stand committed till he has fully answered the interrogatories. By the desire of the Vice-Chancellor, the motion was mentioned to the Lord Chancellor, when his Lordship observed that if the order rendering the third insufficient answer as penal as the fourth, had never been acted upon, it could not at the distance of one hundred and twenty years be put in force. Upon this intimation of the Lord Chancellor's opinion, the Vice-Chancellor made the order for the discharge of the defendant.(b)

The fourth answer was then referred for insufficiency upon the original exceptions, and the Master reported it to be insufficient. The plaintiff then obtained the usual order that the defendant should be examined upon interrogatories, and should stand committed; which was in *the following [*188] terms: "Forasmuch as this court was this present day informed by Mr. *Parker*, of counsel for the plaintiff, that the

(a) *Beam. Ord. Cha.* 317.

(b) *1 Sim. and Sta.* 72.

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fourth answer of the defendant, John Balfour, hath been reported insufficient by Mr. Cox, one of the Masters of this court, as by the Master's report, dated this day, now produced, appears; it is, therefore, ordered that the said defendant, John Balfour, be examined upon interrogatories before the said Master, to the points wherein the said defendant's answer is reported insufficient, and that he do stand committed to his Majesty's prison of the Fleet until he shall perfectly answer the said interrogatories, and this court make other order to the contrary.

Before the defendant could be taken into custody, exceptions were taken on his part to the Master's report of the insufficiency of the fourth answer, and a motion was made on his behalf, that the plaintiff might be restrained from re-issuing or otherwise enforcing any process of contempt against him, until after the exceptions to the Master's report should have been heard.

Mr. Hart and E. R. Daniel for the motion.

Mr. Agar and Mr. Parker against it, insisted that whilst the defendant was in contempt, and was keeping out of the way to avoid process, the court ought not to entertain the motion, but that the defendant ought at least to place himself in such a situation, as to be amenable to process, if the court thought fit not to discontinue it.

THE LORD CHANCELLOR:—If the defendant will render himself amenable to the process of the court, I will hear the exceptions immediately, but otherwise I will not discontinue the process until the exceptions are heard. On the fourth answer [*189] being reported insufficient, the court gives credit to the Master's report, and it is a motion of course that the defendant shall be examined upon interrogatories, and stand committed. The order of the court that the defendant shall be examined upon interrogatories is good for nothing (if it turns out that the Master's report is right), unless the defendant is in such a situation as that the plaintiff may put in execution the

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process of the court against him, if the court thinks that it ought to be enforced.

The motion having been refused, the defendant rendered himself amenable to process, by appearing upon the floor of the court, and the exceptions were then brought on for argument.

Mr. *Hart* and Mr. *E. R. Daniel* in support of the exceptions.

Mr. *Agar* and Mr. *Parker* against them.

In the course of the judgment upon the exceptions, the following observations were made by

February 6th.—THE LORD CHANCELLOR:—In forming my judgment upon these exceptions, I have thought it my duty to inform myself of the contents of the first and second answers, with a view to see whether the contents of those answers, being coupled with the contents of the third and fourth answers, the bill upon the whole is so perfectly answered, as ought to be considered satisfactory; because I take it for granted that a party who has put in a fourth answer, has a right to say he will have the court decide whether that fourth answer is sufficient, not by looking at the fourth answer only, but by looking at the fourth answer, connected and taken *with the three pre- [*190] ceding answers. In this case I believe I may lay aside both the first and second answers, because I apprehend they do not even affect to give any answer at all to the interrogatories out of which the exceptions arise. The question, therefore, is to be considered with respect to the third and fourth answers only. The defendant by his third answer admits that he has in his possession, custody or power a number of accounts, letter books, &c., the particulars of which he has set forth in a schedule to the answer; and he goes on to state that he believes a number of books of accounts, &c., are in the island of Tobago, or elsewhere in the West Indies, but he does not state whether the last-mentioned books of account, &c., are in his possession, custody,

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or power. The omission is extremely material, for if the defendant had admitted the books, &c., in the West Indies, to be in his possession, custody or power; the plaintiff might have made a motion, calling upon the court to order the defendant to produce all the accounts, books, &c., as well those mentioned in the schedule, as those in the West Indies, and the court would have done so, at the same time making this distinction, namely: it would have ordered those in the schedule to be produced forthwith, but, with respect to those in the West Indies, it would never have done so absurd a thing as to call for them immediately, but would have ordered the defendant to bring them here within a reasonable time; and if he had not got them here within a reasonable time, would have considered it the same as if he had them here in the first instance, and had refused to produce them.(a) So that the third answer, even so far as this passage goes, was clearly insufficient. The Lord Chancellor then observed upon other passages, in which he considered both the third and fourth answers to be insufficient, and concluded by remarking that there was a material passage in the last [*191] answer, in which the *defendant stated that he had not the West India papers, writings, &c., in his possession, custody or power, because they were then coming over to this country; but that he was perfectly of opinion that they were in the possession, custody or power of the defendant, and had been ever since the institution of the suit, for that if they actually belonged to the defendant, though they might be in the West Indies, they must be in his possession, custody, or power.

Pending the argument of the exceptions, the defendant was kept in custody at an hotel in the neighborhood of the court, and after the exceptions were overruled, the Lord Chancellor observed, that if the plaintiff meant to exhibit interrogatories, he must do so immediately, and desired that, in the meantime, the defendant should continue in the same species of mitigated confinement, to which he had before been subjected. Very exten-

(a) *Freeman v. Fairlie*, 3 Meriv. 44.

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sive interrogatories having been exhibited on the part of the plaintiff, for the examination of the defendant, and having been handed up to the court; Mr. *Hart* and Mr. *E. R. Daniel*, on the part of the defendant, submitted, that the interrogatories must refer directly to the points in which the answer was defective, and ought to be settled by the Master; and they mentioned a case of *Burton v. Wilkinson*, in which a defendant, who was in contempt for non-compliance with an order for the production of books, was examined upon interrogatories, and stated, upon the authority of the counsel concerned in that cause, that the interrogatories were settled by the Master. Mr. *Agar* and Mr. *Parker* for the plaintiff, on the other hand, insisted that the interrogatories ought not to be confined strictly to the points on which the exceptions were sustained, but might be extended to matters consequential upon those points, and they urged the inconvenience of referring it to the Master to settle the interrogatories, inasmuch, as if the parties were dissatisfied with the judgment *of the Master, there might be an appeal [*192] to the court, and the party in contempt must continue in custody pending the appeal.

February 22d.—THE LORD CHANCELLOR:—The inclination of my opinion is, that the interrogatories should go to the Master to be settled—care must be taken, that they go directly to the points, to which the exceptions are sustained; and it will be for the Master to judge whether they have a direct reference to those points or not. I never recollect, in all my experience, a case in which the fourth answer was insufficient, and, therefore, I do not know that it has been laid down, that the Master should in such a case settle the interrogatories; but if the point is new, it appears to me that it is very much to the purpose, that the interrogatories should be settled by the Master.

February 27th.—The following order was made by the Lord Chancellor:—Whereas by an order, dated the 23d of January last, it was ordered, that the defendant John Balfour should be examined upon interrogatories before Mr. Cox, the Master to

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whom this cause stands referred, to the points wherein his answer was reported insufficient, and that he should stand committed to his Majesty's prison of the Fleet until he should perfectly answer the said interrogatories, and this court make other order to the contrary; and whereas in pursuance of the said order, interrogatories have been exhibited before the said Master, and the same have been perused by the Right Honorable the Lord High Chancellor of Great Britain, and in the presence of counsel learned on both sides, his Lordship doth this day order, that it be referred to Mr. Cox, the Master to whom this cause stands referred, to settle the interrogatories upon which the defendant John Balfour is to be examined.

[*193] *In pursuance of the last order, the interrogatories were settled by the Master. They were strictly confined to the points to which the exceptions were sustained, but required from the defendant a much more minute and particular discovery as to those points, than was called for by the original bill.

March 13th.—The defendant having been permitted to continue in mitigated custody, from the time when the exceptions were brought on for argument, a motion was now made on the part of the plaintiff, that the defendant might be ordered to attend before the Master to answer the interrogatories personally, or if he did not, that he should stand committed to the Fleet.

Mr. *Agar* and Mr. *Parker* in support of the motion:—Where the examination is upon interrogatories, after a fourth insufficient answer, it must be taken personally. In *Gower v.*

[*194] *Lady Baltinglass*,^(a) which was the case of *a fourth insufficient answer, the court not only considered that the

(a) 1 Ch. Cas. 66. The only orders to be found in the register, which appear to relate to the insufficiency of the answers in this case, are subjoined:—

Whereas by an order of the first of March last,* taken upon the arguing exceptions put in by the defendant to the reports made in this cause by Sir Justinian Le-

*1665: 26th May.

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examination ought to be personal, but refused to permit Lady Baltinglass' counsel to be present at the examination, or to permit her to have a copy of the *interrogatories. [*195] In *Anon.*, Mosely 86, an application was made to the court, that a defendant, who was in Ireland, might have a com-

win, Knight, &c., whereby the said Master had reported the 4th answer of the defendant the Lady Baltinglass to be insufficient, it was ordered, that the said defendant the Lady Baltinglass should forthwith attend the said Master, and bring in upon her oath before him all the writings, which by her answer she offered to do, to be perused and examined by the said Master, who was to certify the court thereof; and as to the deed of settlement and counterparts thereof, therein mentioned, and the powers therein contained, the leases and counterparts thereof, and rents thereupon reserved, the said Master was to examine the said defendant upon interrogatories to be preferred by the plaintiffs, and, upon the Master's report, such further order should be taken as should be meet; and in the meantime the judgment of the court as to the said defendant's fourth answer was suspended; in pursuance of which order the said Master, by his report dated the 12th of May instant, certified the said defendant the Lady Baltinglass had attended, but refused to obey the said order; whereupon the said plaintiff upon the 24th of May aforesaid moved for the defendant the Lady Baltinglass' commitment to the prison of the Fleet, her fourth answer being reported insufficient, and upon hearing of the said defendant's counsel, who alleged the interrogatories to contain two sheets of paper of matters of law, the court then pronounced an order, which is not yet drawn up, for the said defendant to be examined before the said Master upon the said interrogatories, and bring in the said writings upon oath within four days, or to stand committed, and if the said Master should think fit, the said lady was to have counsel present upon her examination; now upon opening of the matter this present day unto this court, by Mr. *Serjeant Maynard* and Mr. *Solicitor-General* being of the plaintiff's counsel, in the presence of Mr. *Churchill* and Mr. *Vincent* being of the defendant's counsel, the said plaintiff's counsel now moved, and offered divers reasons to explain the said orders so pronounced as aforesaid, that the said defendant the Lady Baltinglass, ought not to have counsel to attend the said Master, it being against all precedent, and that the said defendant may perform the said order of the 1st March aforesaid within four days, or may stand committed, whereunto counsel for the said defendant insisted, that the said interrogatories were of great length, and did contain matter of law which the said defendant the Lady Baltinglass could not answer without the advice or assistance of her counsel; upon debate whereof, and hearing what was alleged on either side, this court doth order, that the said defendant the Lady Baltinglass shall attend the said Master, and perfect her examination according to the said order of the 1st of March last, within four days next after the entry thereof, or in default thereof to stand committed to the prison of the Fleet, and if upon her examination the said Master shall find matter of law contained in the said interrogatories, and shall so direct, then the said Master is at liberty to hear the

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mission to examine him in writing as to a contempt, he [*166] being out of the jurisdiction, and not capable *of being examined personally; the application was granted, but the case shows, that according to the course of the court, the examination ought to have been personal. In the *Welsh Company v. Moor*,^(a) an application for a copy of interrogatories relating to a contempt was refused, which leads to the conclusion, that an

defendant's counsel to such points only, but the defendant's counsel is not to be present in the room at the time of the defendant's examination. [Reg. Lib. A. 1664, fol. 699.]

Upon opening of the matter this present day* unto the Right Honorable the Lord High Chancellor of England, by Mr. *Solicitor-General*, Mr. *Serjeant Maynard*, and Sir *Edward Turner* of counsel with the plaintiff, in presence of Mr. *Attorney-General* and Mr. *Churchill* of counsel with the defendant, and upon reading of a report made in this cause by Sir *Justinian Lewin*, Knt. &c., dated the 17th day of this instant, in pursuance of an order of the 26th May, pursuant to an order of the first March last, whereby it was ordered that the defendant the *Lady Baltinglass* should be examined by the said Master upon interrogatories to be preferred by the plaintiffs, touching the deed of settlement and counterpart thereof, and the powers therein contained, the leases and counterpart thereof, and the rents thereupon reserved, and the Master hath by this said report certified, that he appointed several times for the taking of the same, at most of which the said lady had attended, and having spent many hours at each time, had dispatched the four first interrogatories relating to the deed of settlement or *tripartite indenture*, but as to the four subsequent interrogatories touching the lease and writings, the defendant, the *Lady Baltinglass* was not pleased to be examined, upon being as she affirmed advised by her counsel, that she was not bound to answer the same, having brought in the trunk of writings upon oath according to the order in that behalf, and therefore, and in regard the said lady doth refuse to be examined on the said interrogatories, it was prayed, that she may stand committed to the prison of the Fleet, but the counsel of the defendant the *Lady Baltinglass* insisted, that she had brought in all the deeds and writings in her custody upon oath, and so cannot have a fuller answer, whereupon, and upon reading the interrogatories not answered unto, and hearing what could be alleged on either side, his Lordship declared, that she ought to be examined thereupon, and answer the same, and doth therefore order, that the said defendant, the *Lady Baltinglass*, do in eight days next attend the said Master, and be examined on the said four subsequent interrogatories, and perfect her examination thereupon, or in default thereof she is then to stand committed to the prison of the Fleet without further motion. Reg. Lib. A. 1664, 761.

(a) 1 Dick. 336.

*1665: 23d June.

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examination by parol must have been intended. By these cases it appears, that it is not unusual to have a personal examination in courts of equity. There is a modern case of *Colson v. Graham*, in a court of law upon this subject. The parties agreed to a reference to arbitration, and one of the terms of the order made at *nisi prius* was, that no bill in equity should be filed. A bill was filed, and the court of law treated it as a contempt. Interrogatories were exhibited in the crown office to examine as to the contempt, and the examination was personal. If the defendant is to be at liberty to put in an examination in writing, there will be no use in the order for an examination before the Master, it will have the effect only of producing a fifth insufficient answer.

Mr. *Hart* and Mr. *E. R. Daniel* against the motion: It has always been understood, that the records of this court should contain all the proceedings in every cause, regularly taken in writing, so as to enable the court at any time to form a judgment upon those proceedings. The interrogatories being in writing, they must be answered in writing, and before the defendant is permitted to swear to the answers, they must be looked over by the Master, and if they appear to be defective, the Master must order them to be altered. Every defendant has a right to have access to the court to correct the judgment of the Master; how is that access to be had, if the examination is to be by parol? In *Burton v. Wilkinson* *the examination to the interrogatories was put [*197] in in writing. If the defendant is to be examined personally, it will be necessary for him to have a written examination with him, as a memorandum for the purpose of refreshing his memory.

THE LORD CHANCELLOR:—The ordinary rule of the court in cases of contempt is, that there shall be a personal examination of the party, but whether that rule applies to cases where the fourth answer is insufficient, is another matter. In ordinary cases of contempt, there is not much difficulty in examining per-

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sonally, because the examination applies to a fact, or to the intention, but there may be great difficulty in examining a party personally to such interrogatories as the Master has settled in this case; nevertheless if the practice is, that the examination shall be personal, though there may be difficulty in it, that practice must be preserved, and therefore I must see the orders in *Gower v. Lady Baltinglass*, before I decide this point.

March 22d.—THE LORD CHANCELLOR:—I have seen the orders in *Gower v. Lady Baltinglass*, and it appears to me (though I cannot deliver myself from the opinion that it is a very inconvenient mode of proceeding), that a defendant, standing in the situation in which the present defendant stands, instead of putting in a written examination, is to be examined personally. The orders in that case appear to me to show, that according to the strict practice of the court, the Master is to settle the interrogatories, the party is to attend the Master, and upon the interrogatories the Master is personally to examine the party. With respect to the order for counsel not being at liberty to attend the party before the Master, I should be extremely unwilling [*198] ling *to follow any such precedent as that; there are here four insufficient answers, and each of those four answers was drawn with the advice of counsel, it is said that the defendant is now to amend those answers upon an examination on interrogatories; surely, therefore, it is a hard thing to say, that he is not now to have the benefit of the continued advice of his counsel. According to the rule, as laid down in the case of *Lady Baltinglass*, the court does not preclude the defendant from having the assistance of counsel, but it is said counsel are to be in the next room, to be consulted on matters of law; who is to judge of the points on which the advice of counsel is to be called in? Is it to be supposed that the defendant is capable of drawing nice distinctions between matters of fact and matters of law? I think the Master may be safely entrusted with hearing counsel on both sides. The supposition that a personal examination before the Master, is as likely to elicit truth, as an examination by counsel, putting such questions as occur to their minds in the

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course of the examination, appears to me to be founded in mistake; for after the Master has settled the interrogatories, he cannot put any fresh question, as counsel might do in the course of a *parol* examination. I do not mean to say that these are not very proper interrogatories, but it certainly would be impossible for any man to answer them without previous preparation, which alone shows, that a personal examination here, is not at all analogous to the *viva voce* examination of a witness. I cannot help strongly recommending to the parties, that the mode of proceeding be this, that Mr. Balfour be allowed to put in a written examination to these interrogatories, and then to attend before the Master, for the Master again to put to him each or any of the questions which he may think have not been sufficiently answered. If, however, the plaintiff will not consent to that mode of proceeding, I cannot order it. It has been argued that the defendant will be entitled to have his examination in his hand, in the same *manner as a witness might have. [*199] I think that he may have his examination in his hand, and for purposes, for which, perhaps, a witness would not be permitted to have it, for I apprehend that if a witness knew what questions were to be put to him, he would not be permitted to have in his hands in writing such answers as he considered he would give to those questions. All that can be done is, to send it to the Master to put these questions to Mr. Balfour, and if I were Mr. Balfour, I would have a written memorandum of what answers I was determined to give to those questions.

The order for the personal examination of the defendant, after reciting the order of the 23d of January, 1823, and that the defendant had since remained in the custody of the tipstaff, attending the court, and further reciting the order of the 27th of February, 1823, and that in pursuance of that order the Master made his report, dated the 13th of March, 1823, and thereby certified, that he had settled the interrogatories, proceeds in the following terms: "It was therefore prayed, that the said defendant John Balfour may attend before the said Master, at his chambers, to be examined upon the said interrogatories, or in default thereof

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that the said defendant may thereupon, without further motion, stand committed to, and be confined in close custody in his Majesty's prison of the Fleet, until he shall submit to and be examined before the said Master upon the said interrogatories, and perfectly answer the same, and this court make other order to the contrary; whereupon, and upon hearing Mr. *Hart* and Mr. *Daniel* of counsel for the said defendant, the said order of the 23d of January, 1823, the said order of the 27th of February, 1823, and the said Master's report of the 13th of March, 1823, his Lordship doth order that the said defendant, John Balfour, do personally attend Mr. Cox, one of the Masters of this court, and be examined upon the interrogatories exhibited by the plaintiff, [*200] and the said *Master is to be at liberty to repeat the said interrogatories, or any of them to the said defendant, John Balfour, as he, the said Master, may think fit.

The following mode of examination was adopted by the Master: A written answer to the interrogatories was prepared and carried in by the defendant to the Master; the Master compared the answer with the interrogatories, and then determined, whether or not it was satisfactory. In the points in which the Master considered the answer to be unsatisfactory, the defect was supplied by the personal examination of the defendant, till the Master was of opinion that the answer was sufficient. The plaintiff had no notice of the defendant being under examination, and did not attend before the Master.

On the 27th of March, 1823, the Master made the following report:—

In pursuance of an order of the High Court of Chancery, dated the 23d of January, 1823, whereby, after noticing that the fourth answer of the defendant, John Balfour, had been by my report, dated the said 23d of January, 1823, reported insufficient, it was ordered that the said defendant, John Balfour, should be examined upon interrogatories before me, to the points wherein the said defendant's answer was reported insufficient, and that he

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should stand committed to his Majesty's prison of the Fleet until he should perfectly answer the said interrogatories, or the court make other order to the contrary; and also in pursuance of another order of the said court, dated the 27th of February, 1823, whereby, after taking notice of the before-mentioned order of the 28d of January, 1823, and after stating that in pursuance of the said order interrogatories had been exhibited before me, and that the same had been perused by the Lord High Chancellor, it was referred to me to settle the interrogatories, upon which the defendant John *Balfour was to be examined; and [*201] likewise in pursuance of another order of the said court, dated the 22d of March, 1823, whereby, after stating the two several before-mentioned orders, and my report of the 13th of March, 1823, whereby I certified that I had settled the said interrogatories, it was ordered, that the said defendant John Balfour should personally attend me, and be examined upon the interrogatories exhibited by the plaintiff, and whereby I was to be at liberty to repeat the said interrogatories, or any of them, to the said defendant John Balfour, as I should think fit; I have been attended by the said defendant John Balfour in person, and have taken his examination thereto, pursuant to the said last-mentioned order, and which examination appears to me to be full and sufficient, and the same now remains in my office; all which I humbly certify to this honorable court.

SAM. C. COX.

March 27th.—Mr. *Hart* and Mr. *E. R. Daniel* this day moved, upon the Master's report that the examination was satisfactory, that the defendant might be discharged out of custody, and contended that the judgment of the Master was final.

Mr. *Agar* and Mr. *Parker* for the plaintiff, insisted that the court ought not to discharge the defendant, till the plaintiff had seen the examination; and objected to the mode in which the examination had been conducted by the Master, contending that each of the questions contained in the interrogatories ought to have been distinctly put to the defendant by the Master, and that

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the plaintiff ought to have had notice of the examination, and had a right to be present at it.

THE LORD CHANCELLOR:—If the plaintiff has not [*202] seen the examination, he must *undoubtedly see it, before the defendant is discharged. Where a defendant puts in four insufficient answers, the consequence is that he is taken into custody, and the court orders that he shall be examined upon interrogatories; the object of the court is, that upon that examination, he shall not be liberated out of custody, till he has given a sufficient answer, not only to the questions contained in the bill, to which he has not before answered, but to every question which the Master thinks may fairly arise out of the matter, which may be contained in the answers to those questions, without putting the plaintiff to the trouble of amending his bill. The Master has done all, which from the nature of the case he could do, with respect to the examination of the defendant; he has taken every pains to execute the duty which the court imposed upon him. The mode of examination which he has adopted, is quite as satisfactory as if he had put the questions to the defendant, one after another, in which case he never could have got a sufficient answer at all. I am perfectly satisfied, that if the strict practice, which the counsel for the plaintiff call upon the court to pursue, had been pursued, the lives of ten men would not have been sufficient to answer such interrogatories as these. No court which examines *viva voce* would permit such complicated questions to be put. My opinion is, that the plaintiff had no right to hear anything about this examination. I apprehend the examination goes on, just as if a further answer was to be put in, about which further answer the plaintiff could know nothing at all.

April 11th.—The defendant by his examination having referred to two schedules, containing a list of deeds and letters respectively in his possession; the counsel for the plaintiff insisted upon their right to a production of the documents mentioned in the schedules, before the defendant was discharged; and

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the Lord Chancellor said, that they had a *right to see [*203] all the documents referred to in the examination, if they were so referred to, that in the case of an answer, they would have made part of the answer.

April 12th.—After the documents had been produced, Mr. *Agar* and Mr. *Parker* for the plaintiff, contended that the examination was insufficient, and argued that they had a right to show the insufficiency of the examination, as cause against the discharge of the defendant.

The Lord Chancellor doubted whether he had any right to discuss the sufficiency of the examination, in the form proposed by the counsel for the plaintiff; and suggested that the proper course might be, to discuss the question upon the old exceptions, with respect to any of the original interrogatories in the bill which remained unanswered, and upon new exceptions, with respect to any new questions which the Master might have introduced in settling the interrogatories, and which the plaintiff might consider not to be sufficiently answered. His Lordship expressed a wish to hear counsel on the point; but the counsel for the defendant not entering into any detailed argument upon the subject, the question of insufficiency was ultimately discussed, upon the motion for the discharge of the defendant.

April 22d, 24th, 26th and 29th; May 1st.—Mr. *Agar* and Mr. *Parker*, in showing cause against his discharge, contended that the examination was not only insufficient, but that it was manifestly false, and inconsistent with what had been sworn by the defendant in his previous answers, and that the defendant therefore ought not to be liberated out of custody, till he had put in another examination.

Mr. *Hart* and Mr. *E. R. Daniel* for the defendant:—This court only keeps a defendant in custody, for the purpose *of securing to the plaintiff a perfect answer; and [*204] this defendant, having fully answered the interroga-

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tories, is therefore entitled to his discharge. If the court adopts the principle, that any inconsistency which may exist between the defendant's answers and his examination, is a ground for detaining him in custody, he never can be discharged at all; as no future information which he can give, can be consistent with both his answers and his examination, if they are inconsistent with each other.

In the course of the argument the Lord Chancellor repeatedly observed, that it was not the truth or consistency of the examination that he was bound to insist upon. That the examination might be quite sufficient, though it might not be true, and that in deciding upon the question of sufficiency, the principle of the court was, that the plaintiff must be satisfied, with what the conscience of the defendant would allow him to swear, for that the court could give him no more; that if the plaintiff wished to try the truth of the examination, he must treat it in a different manner, for that although there might be a probability, that that which was sworn was not true, yet that it must be taken to be true, and it was not within the jurisdiction of the court to try whether it was true or not. Upon the subject of inconsistency his Lordship also observed, that though the examination might be inconsistent with the answers, still it might be sufficient; for that if two answers contained inconsistent representations, no further answer could possibly be sufficient, if inconsistency formed a ground for considering it to be insufficient, as if a further answer was received, it might be inconsistent with the first answer, and agreeing with the second, or inconsistent with the second answer, and corresponding with the first, but could not be consistent with both the answers; and that [*205] *inconsistency, therefore, did not go to the point of insufficiency.

May 3d.—The LORD CHANCELLOR said he thought that the examination, taking it all together, would be sufficient, if the defendant would make an affidavit that he had not in his possession, and had no recollection of the contents of a letter, which

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he had set forth in some of the earlier proceedings in the cause with so much particularity, as to induce the belief that it must at that time have been in his possession; but to which he had not adverted in his examination upon the interrogatories.

The defendant, on the 5th of May, made the affidavit required by the Lord Chancellor, and extended it to account for certain deeds, relating to the estates in question, which were in the possession of a person who had offered to assist the defendant by producing them.

May 6th.—Mr. *Agar* and Mr. *Parker* for the plaintiff, now contended that the deeds in the hands of the defendant in this country ought to be open to the inspection of the plaintiff; and that the defendant ought not to be released out of custody till he had given security for the production of the West India papers, when they should arrive.

The LORD CHANCELLOR said that with respect to the deeds in this country, the plaintiff must have the inspection of them; and that for the purpose of securing that inspection, he would order them to be deposited with the Master. With respect to the papers in the West Indies, his Lordship said that he could make no order at present, but that upon a motion for that purpose, he should have no difficulty in ordering the defendant to produce them within a given time, and if they were not produced in conformity to the order, he would again take the defendant into custody, or in the event of his leaving the *country, would lay his hands upon the estate. That [*206] he considered the estate as a security for the production of the papers, and would not, therefore, compel the defendant to give any other security.

The counsel for the defendant then admitting that the West India papers had arrived in this country, since the examination was put in; and, not desiring to put the plaintiff to a motion for the production of them, the following order was made for the discharge of the defendant.

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His Lordship doth order that the defendant, John Balfour do deposit with the Master upon oath, the deeds, books, papers and writings mentioned respectively in the schedules to his third and fourth answers, and in the schedules A. and B. to his examination to the plaintiff's interrogatories, and the deeds of the 15th and 16th days of June, 1804, and the deed of the 16th day of July, 1804, mentioned in his affidavit, sworn the 5th day of May, instant, and thereupon, and upon his paying the plaintiff's costs, charges and expenses already taxed, and giving security to be allowed of by the Master for the payment of such further costs, charges and expenses of the plaintiff as the court shall award; it is ordered that he be discharged out of custody as to his said contempt; and it is ordered that the defendant, John Balfour, do, on or before the 20th day of May, instant, deposit with the said Master all such of the deeds, books, papers and writings stated by him to have been in the West Indies, or to be on their way from thence to this country, as have lately arrived, and been received by him, with such affidavit as he may be advised to make in respect thereof; and it is ordered that the said defendant do, on or before the first day of November next, deposit with the said Master the remainder of the said deeds (if any), books, papers and writings last above mentioned or referred to, to be verified by affidavit.

[*207]

**LECHE v. KILMOREY.*(a)

ROLLS.—1823: 4th May.

A sum of money was paid by A. to B., for the purpose of purchasing C. promotion in the army, and it remained unapplied in the hands of B. at the death of A.

C. having been compelled from the bad state of his health to quit the army, and having no prospect of being able to enter into the service again, filed a bill for the money, and it was decreed to be paid to him.

BEFORE *Graham*, Baron, and Masters *Cox* and *Harvey*, for the Master of the Rolls.

(a) *Ex relatione* Mr. Wigram.

1823.—*Leche v. Lord Kilmorey*.

The plaintiff, James Leche, being a lieutenant in the 86th regiment of foot, of which Lord Kilmorey, then General Needham, was colonel, William Leche paid the sum of 1,050*l.* into the hands of Messrs. Cox and Greenwood, army agents, to the account of General Needham, accompanied by the following note: Gentlemen, I inclose 1,050*l.*, to be placed to the account of General Needham, and to be at his disposal, for the use of Lieutenant James Leche of the 86th regiment. The 1,050*l.* was paid to General Needham, for the purpose of purchasing the plaintiff rank in the army, when an opportunity should offer, and it remained in the hands of Cox and Greenwood. at the time of the death of William Leche. After his decease, the plaintiff having been compelled from the bad state of his health to quit the army, and having no hopes of being again able to enter into the service, filed this bill, in the year 1822, against Lord Kilmorey, and against the representative of William Leche, stating the facts above-mentioned, and alleging that the money was paid to General Needham, with a direction, that until it could be laid out in purchasing promotion, it should be invested on good securities, and the interest paid to the plaintiff, and that several small sums of money had been actually paid to the plaintiff in respect of such interest; the bill, therefore, prayed that the plaintiff might be declared entitled to the payment of the said *sum of 1,050*l.*, and the interest due thereon, and that [*208] the same might be paid to him accordingly.

The defendant Lord Kilmorey, by his answer, denied that any directions were ever given respecting the laying out the 1,050*l.* at interest, or that the plaintiff was entitled to the interest, or that he had ever been paid any money in respect thereof, and stated that he had been advised that when the plaintiff left the army he forfeited his right to the principal and interest.

The other defendant claimed the 1,050*l.* and interest as the representative of William Leche.

Mr. *Sugden* and Mr. *Wigram* for the plaintiff cited *Barlow v.*

 1823.—Attorney-General v. Lord Hotham.

Grant, (a) Nevill v. Nevill, (b) Barton v. Cooke, (c) Hammond v. Neames. (d)

Mr. Wray for the representative of William Leche.

GRAHAM, Baron:—The intention of the donor was evidently to make a provision for the plaintiff, but still if the plaintiff had died in the lifetime of the donor, the donor, and not the personal representative of the plaintiff, would have been entitled to the money. The plaintiff, however, as far as he has been able, has co-operated with the intention of the donor, and the circumstance that the money was left in the hands of the army agent till the death of the donor, is a strong circumstance from which to infer his intention that the plaintiff should take the money absolutely.

• The decree was made according to the prayer of the bill.

[*209] *ATTORNEY-GENERAL v. LORD HOTHAM

ROLLS.—1823: 9th, 10th and 12th June.

Upon an information to set aside a lease for ninety-nine years of charity lands, the defendants, the lessees, set up a title adverse to the lease; upon the merits it was held, that there was no ground for the defence, but the court was of opinion, that if the merits had been otherwise, the defendants were estopped, and could not dispute the title while they retained the possession.

Semble. The lessees ought not to have been permitted to enter into evidence, upon the principle that the plea of *nū habuit in tenementis* could not have been pleaded at law.

A mere husbandry lease of charity lands for ninety-nine years at an uniform rent cannot be supported.

The court rolls of a manor, taken by themselves, are evidence only against the tenants of the manor, and the lord of the manor.

Presumption of law in favor of long enjoyment, and uninterrupted possession.

(a) 1 Vern. 255.

(b) 2 Vern. 431.

(c) 5 Ves. 461.

(d) 1 Swanst. 35.

1823.—Attorney-General v. Lord Hotham.

Where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing; and does not create any necessity for an appeal.

THIS information, which was filed at the relation of the churchwardens and overseers and some of the inhabitants of the parish of East Moulsey stated that there had been from time immemorial situate within the said parish certain enclosed lands, called the Hale and Hale Platts, which were many years since conveyed by the then owners thereof for the use and benefit of the said parish, and that the said lands, although the conveyance thereof had been lost, had from time to time been let by the inhabitants of the said parish assembled in vestry, and that the rents and profits of the said lands had from time immemorial been received by the churchwardens and overseers of the said parish, and applied in the repairs of the church, in the maintenance of the poor, and in other parochial purposes in aid of the rates.

The information then stated, that in the year 1767 the lands in question were demised by the then churchwardens of the parish, with the consent of the overseers and other inhabitants of the parish in vestry assembled, to Thomas Sutton and Susannah Norman, the owners of the adjoining land, for the term of twenty-one years, at the yearly rent of 31*l.* 10*s.*, subject to a covenant that they would not dig, plough up, or convert into tillage, or sow with any kind of grain, the demised premises, or any part thereof, or lop or top any of the trees thereon; and it further stated, that upon the expiration of the above-mentioned lease in the year 1788, the said lands were (at a vestry of the parishioners), again demised to the said Thomas *Sutton, for the benefit of himself and Sir Beaumont [*210] Hotham, (who had become entitled to the interest of the said Susannah Norman in the adjoining lands) for the further term of twenty-one years, at the like rent of 31*l.* 10*s.*, and subject to the like covenants as were contained in the first-mentioned lease.

 1823.—Attorney-General v. Lord Hotham.

Grant,^(a) *Nevill* v. *Nevill*,^(b) *Barton* v. *Cooke*,^(c) *Hammond* v. *Neames*.^(d)

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The information next stated, that the said Thomas Sutton died shortly after the date of the last-mentioned lease, and that upon his death the benefit of such lease became vested in Sir Thomas Sutton his son, and that at a meeting of the inhabitants of the parish in their vestry, held on the 30th July, 1789, it was agreed that the lease of the Hale lands granted to the said Thomas Sutton in the year 1788 should be cancelled, and a new lease thereof granted to the said Sir Thomas Sutton, for the term of ninety-nine years, at the like rent and subject to the like covenants as were contained in the former lease, and that such new lease was accordingly executed by the then churchwardens of the parish to the said Sir Thomas Sutton.

The information then stated the death of Sir Thomas Sutton in 1813, and that by virtue of his will the defendants claimed to be entitled to the beneficial interest in the Hale lands for the residue of the said term of ninety-nine years, and it then set forth an Act of Parliament, passed in the year 1815, by which commissioners were appointed for dividing and enclosing the commons and waste lands in the parishes of East and West Moulsey, and were empowered to hear and determine any dispute which might arise between any parties interested in the said division and enclosure, concerning the respective shares and proportions which any of them should claim in or to the lands and grounds thereby directed to be divided and enclosed: but it was provided by the Act, that nothing therein contained should extend to enable the said commissioners to determine [*211] *the title to any messuages, lands, tenements or hereditaments whatsoever, or to determine any right between any parties contrary to the possession of any such parties, except in cases of encroachment made within the period of twenty years, but that in case the commissioners should be of opinion against the right of the person or persons so in possession, they should forbear to make any determination thereupon, until the possession should be given up by or recovered from such person or persons, by ejectment or other due course of law. The Act of Parliament contained a clause, by which parties aggrieved

were enabled to appeal to the general quarter sessions which should be holden for the county, within two calendar months next after the cause of complaint should have arisen, on giving notice of such appeal to the commissioners and the parties concerned.

After further stating, that from the year 1779 the lessees of the Hale lands had been also lessees under the crown of the manor of East Moulsey, and that the said manor had been recently purchased from the crown by the defendants; the information stated that the Hale lands were treated by the commissioners under the Act of Parliament as common lands, and as such were allotted to the defendants, and it charged, that shortly previous to the expiration of the lease granted to Thomas Sutton and Susannah Norman, in the year 1767, the said Thomas Sutton set up a claim to the said lands, insisting that the same were part of the waste lands and commons of the manor of East Moulsey, and that in consequence of such claim it was deemed advisable to take the opinion of counsel, and that a case was accordingly stated, and the facts in such case approved of and agreed to by the said Thomas Sutton, and his solicitor, and that the said case was laid before Mr. Serjeant Hill for his opinion, and that he gave an opinion in favor of the title of the parish to the said lands.

*After further charging, that in case the Hale lands [*212] were formerly part of the waste lands of the manor of East Moulsey, they were not enclosed therefrom within the space of twenty years previous to the passing of the Act, and that the commissioners had no authority to allot the same to the defendants, the information submitted, that the defendants could not derive any title to the said lands under the said enclosure, or any allotments of the same made by the commissioners, and it prayed that the lease granted in pursuance of the said agreement of the 30th day of July, 1789, might be declared to have been improvidently and improperly granted by the then churchwardens and overseers of the parish of East Moulsey, and that

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the same might be declared to be null and void, and might be delivered up to be cancelled; and that the defendants might be decreed to deliver up the possession of the said lands to the churchwardens of the said parish, and to account with them for the rents which had accrued due for the same subsequently to the 25th of December, 1816 (to which time it was admitted by the information that the rents had been paid), and that the defendants might also be decreed to deliver up all deeds, papers and writings relating to the said lands, or any part thereof.

The defendants by their answers, denied that the Hale lands had ever been conveyed for the use of the parish, and insisted that the freehold thereof, as parcel of the manor of East Moulsey, until the allotment under the Act of Parliament mentioned in the formation, was vested in the crown; and after setting forth an extract from the parliamentary survey of the crown lands taken in the year 1649, containing a description of a piece of land called the Hale as part of the common and waste lands belonging to the manor of East Mousley, and also setting forth an extract from the court rolls of the said manor in 1661, [*213] purporting to be an order of the court baron *regulating the mode in which the commoners were to enjoy rights of common on the Hale, the defendants stated, that shortly previous to the year 1710, the practice began of some person solely occupying the Hale, and paying for the benefit of the parish a yearly sum of money by way of compensation for the right of common thereon to which the parishioners were entitled, and that by degrees the parishioners in vestry assembled assumed the right of letting the said lands. The answers admitted that a lease of the Hale lands had been executed to Sir Thomas Sutton, and that upon his death the beneficial interest in such lease became vested in the defendants, and that they and those under whom they claimed had for fifty years held the said lands under the parish, and had during the same period been the lessees of the manor, and then went on to admit that the defendants had lately purchased the manor, and that the Act of Parliament was passed as stated in the information, and after further stating, that

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the commissioners appointed under the said Act had determined the Hale lands to be part of the common and waste lands which they were authorized to allot, and had allotted the same to the defendants, and also stating, that to the belief of the defendants the said lands were not enclosed from the commons and waste lands within the period of twenty years, or any other period of time previous to the passing of the Act of Parliament, but continued parcel thereof up to the time of their being allotted in manner aforesaid; the defendants submitted, that the commissioners had authority to divide and allot the said lands, and that their allotment was final and conclusive, inasmuch as no person had appealed therefrom in the manner prescribed by the Act of Parliament, and they insisted that the allotment could not be impeached by the court, and claimed the same benefit of the objection as if they had made it by plea or demurrer.

The evidence on the part of the informants consisted principally of a series of entries in the parish books, [*214] which were made evidence by being in every instance authenticated by the parties interested in the manor, and which proved that the Hale lands had from the year 1710 been uniformly dealt with as the separate property of the parish; the case laid before Serjeant Hill stated many of these entries, and also stated, that Thomas Sutton the lessee of the Hale lands, being also lessee of the manor, permitted the timber on the Hale to be cut and applied for the use of the parish. The facts stated in this case were admitted to be evidence in support of the information under the following circumstances. It was proved that in the year 1787, when the case was laid before Serjeant Hill, Thomas Sutton was lessee of the manor, and Henry Swana deposed, that in the above-mentioned year, he had frequent communications with the said Thomas Sutton for the purpose of settling the then existing disputes, as to the title of the parish of East Moulsey to the Hale and Hale Platts, and that it was at first proposed to submit the matter to arbitration, and that various communications were had on the subject, and that at length when the necessary facts relating to the matters in dispute were ascertained, it was concluded,

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that instead of proceeding to arbitration, the opinion of Serjeant Hill should be obtained, and that every means were used, by making searches and otherwise, to ascertain the facts to be stated in the case prepared for the opinion of the said Serjeant Hill; and that the statement of facts in the said case was known to and approved of by the said Thomas Sutton, and his solicitors; the witness then deposed, that a case after much altercation and dispute was prepared for the opinion of the said Serjeant Hill, and that his opinion was taken thereon, and that such opinion was communicated or made known to the said Thomas Sutton, the said case and opinion having been in his possession. The

witness further deposed, that he did himself, within a [*215] very short time after the said opinion was *procured, communicate the purport thereof to the said Thomas Sutton, and had several communications with him afterwards upon the subject thereof, and that such case and opinion were on several occasions and at several different times, the subject of discussion with the said Thomas Sutton in the presence of the deponent, and that the said Thomas Sutton submitted to and acquiesced in the said opinion, by consenting to the calling of a vestry of the said parish of East Moulsey for the purpose of re-letting the said lands, and agreeing at such vestry to take the said lands upon lease for twenty-one years. The lease of the Hale lands to Sir Thomas Sutton for ninety-nine years, dated the 18th of November, 1789, was also produced on the part of the informants.

The defendants gave in evidence the parliamentary survey, and the court rolls of the manor, but they did not show any act of ownership or enjoyment following up these documents; they also proved the enclosure act and the award.

Mr. *Horne* and Mr. *Pepys*, for the relators :—The object of this information is to deal with the defendants simply as tenants; the court will not look at the title of the defendants independent of the lease, it will not permit them to take advantage of a possession which they have obtained as lessees, for the purpose of asserting a title which they cannot have except in opposition to

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the rights of their landlord. If the question of title can be introduced at all, it is proved that the parish has been in the habit of letting these lands for upwards of a century; it must thereby have acquired an indefeasible title against all the world; it is not pretended that there has been possession following up the statement in the parliamentary survey; and these lands having been enjoyed by the parish for a period very far exceeding twenty years, the *commissioners, by the terms of [*216] the Act of Parliament, had no authority to allot them; if the defendants are to be considered as the lessees of the parish, it is quite clear that a mere husbandry lease of charity lands for ninety-nine years cannot stand.

Mr. *Shadwell* and Mr. *Temple* for the defendants:—When a lessor proceeds adversely against his lessee for the purpose of setting aside the lease, he dissolves the relation of landlord and tenant, and it is competent to the lessee to protect himself, if he can, by disaffirming the title of his lessor; the parish has had only a qualified possession of this land, they have held it as common lands, and their title is destroyed by the Act of Parliament. It is proved that in 1641, the lands belonged to the crown, and as the crown can grant only by matter of record, if there had been a conveyance to the parish it could have been produced. The Act of Parliament has pointed out a particular mode of appeal, and the jurisdiction of the court is, therefore, excluded.

THE MASTER OF THE ROLLS:—In giving my judgment upon this case, I shall consider it in three points of view, first as it presents the case on the part of the relators, considered as distinct from the case made by the defendants; and secondly, with reference to the case on the part of the defendants, branching out into two distinct grounds of defence. With respect to the first view of the subject, it is unnecessary to make any observations upon it, because the relief sought by this information is quite according to the ordinary practice of the court with respect to charity lands; it is too clear to admit of any doubt, that a hus-

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bandry lease of lands belonging to a charity, for ninety-nine years, at an uniform rent, cannot stand, unless some satisfactory reason can be *given to support it; and in the present case, the fact of the lease for ninety-nine years having been substituted for one of twenty-one years, without any agreement being made for an increase of the rent according to the change of circumstances, or any obligation being imposed upon the tenant to lay out any money upon the estate, is quite conclusive against the lease.

The difficulties, therefore, which belong to this subject, arise out of the case made by the defendants; admitting that they were lessees for ninety-nine years, they contend that the property is changed, and that they are no longer bound by the terms of the contract; to support that position two grounds are taken, first it is said that if the Act of Parliament had never passed, the lands in question would not now have been the separate property of the parish, but common waste lands belonging to the manor or East Moulsey. It is attempted to make that out by adducing the parliamentary survey and the court rolls of the manor, and it is contended that those documents furnish strong evidence to show, that in the years 1649 and 1661, these lands belonged to the manor. Both the documents adduced are undoubtedly deserving of great consideration; the parliamentary survey in particular is entitled to considerable weight, from the accuracy with which it is known to have been taken; but it is to be observed that the evidence is documentary; we do not know that on the survey being taken it was attended by the persons claiming these lands as their property; the parliamentary surveyors may have been mistaken, and with respect to these court rolls of the manor, taken by themselves they are evidence only against the tenants of the manor and the lord of the manor. It is competent to the court baron to enter upon their records my land to be their common, and I have no means to dispute it; their record therefore is of itself but *ex parte* evidence, and does not of necessity bind third persons. The first thing the court looks at as the [*218] *criterion of property, is usage and enjoyment. An-

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cient deeds are exceedingly material if followed up by possession, but if not followed up by possession, and if there has been a long enjoyment and uninterrupted possession in opposition to them, they lose that importance to which they would otherwise be entitled. Very high judges have said they would presume anything in favor of a long enjoyment and uninterrupted possession. Suppose this case was now submitted to the consideration of a jury, and the parliamentary survey and the court rolls of the manor were produced to show that these lands belonged to the crown, and no other evidence was produced to prove that fact; and on the part of the parish the parish books were produced, containing these different entries, and it was proved that the parish had been in the quiet enjoyment and uninterrupted possession of this property for one hundred and ten years—would not that be conclusive? Is not sixty years' possession a title against the crown? Is not one hundred and ten years possession sufficient to put an end to any claim as to this property? We must suppose that persons who have a right to property will assert that right, and if they lay by for one hundred and ten years, and suffer the property to be enjoyed by other persons, that enjoyment must constitute right. I cannot have the least hesitation in saying, that whatever may have been the origin of the possession of these lands by the parish, that possession, coupled with the circumstance that the party who it is said is entitled, has been standing by and making no objection to the property being enjoyed as the separate property of the parish, must decide the question; and that we must consider these lands as having been originally granted to trustees for the benefit of the parish, and to be enjoyed by them as their separate exclusive property.

The second part of the case made by the defendants is, that the Act of Parliament gave the commissioners jurisdiction *to decide the question with respect to these lands, [*219] but I am clearly and decidedly of opinion that they had no jurisdiction at all, and that they were expressly prohibited from interfering or meddling in any manner with this subject;

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it follows as a matter of course, if they had no jurisdiction, that their decision is a nullity; it does not create any necessity for an appeal, where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it; if it decides upon matters with respect to which it has no authority, its decision amounts to nothing, and no party can in the least be bound by it.

There is, therefore, no ground of defence upon which the right of the relators to the property in question can be resisted; but there is a feature in this case which courts of justice have always considered it their duty to mark with the strongest censure; that the tenant, instead of endeavoring to protect and support the title of his landlord, has done all in his power to impeach it. If there is one principle more established than another with respect to the relation between landlord and tenant, it is this, that if a tenant receives the possession of an estate from a landlord, he never can dispute the title of that landlord. There are instances where, under peculiar circumstances, courts of justice, when third persons have been interested, have let the tenant in to show that the person to whom he has paid rent was not entitled to receive it; (a) but even in such cases it has always been done with the very greatest caution. With respect to the principle, it is the first maxim for every tenant to understand, that so long as he retains possession, he cannot dispute the title of the person who gave him that possession. There have been cases in which it has been evident that the landlord had no title, and yet the court would not hear the tenant say so, as for instance in the case of [*220] the *Bedford Level*, (b) *where they wanted to show that the lease was good for nothing because it was not registered, when the tenant came to state that, his evidence was not allowed to be received.

It has been decided a hundred times over, that the tenant cannot plead the plea of *nil habuit in tenementis*, and that the plaintiff in cognizance or in avowry is not called upon to show his

(a) *Rogers v. Picher*, 6 Taunt. 209.

(b) 6 East, 536.

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title; it would be contrary to the principle upon which the relation between landlord and tenant exists, to allow the tenant to dispute his landlord's title; for there is an implied covenant that the landlord shall protect the tenant's enjoyment, and the tenant shall guard the landlord's title. If the merits of this case had been otherwise, the defendants were estopped; if they wished to dispute the title of their landlord they ought to have given up the possession; I almost doubt whether they ought to have been permitted to enter into evidence at all, upon the principle that the plea of *nil habuit in tenementis* could not have been pleaded at law; but for the purpose of meeting the justice of the case, I was unwilling to exclude the evidence. Upon the whole view of this case, I have not the least doubt but that the relators are entitled to the relief they pray; the consequence is that the lease must be declared null and void, that possession must be delivered up, and that there must be an account of the rents according to the true value; and the defendants must pay all costs.

The following decree was made.

His Honor doth declare that the lease, dated the 18th day of November, 1789, of the charity lands and premises in the pleadings mentioned, called the Hale and Hale Platts, for the term of ninety-nine years, granted in pursuance of the agreement of the 30th day of July, 1789, in the pleadings mentioned, is void, and doth decree the *same accordingly; and his [*221] Honor doth order and decree, that the defendants do deliver up the said lease to the relators William Greening Martin and William Annison, the churchwardens of the said parish of East Moulsey, to be cancelled, and that the said defendants do deliver up possession of the said charity lands with the appurtenances, and all other the premises comprised in the said lease, to the said William Greening Martin and William Annison as such churchwardens as aforesaid; and his Honor doth order and decree, that it be referred to the Master to take an account of the rents of the said lands and premises, which have accrued due since the 25th of December, 1816, and which have been received

 1823.—*Prichard v. Ames*.

by the said defendants, or by any other person or persons by their or either of their order, or for their or either of their use, and in case it shall appear upon taking the said account, that the said defendants or any or either of them, have been in the occupation of any part of the said lands and premises since the said 25th of December, 1816, or if the said Master shall not be able to ascertain what rents have been received in respect of such lands, the said defendants are to be charged in taking the aforesaid account according to a valuation to be set thereon by the said Master; and it is ordered that the said Master do consider what is a reasonable rent to be paid by the said defendants during such time; and it is ordered that the said defendants be charged therewith accordingly; and it is ordered that what shall be found due on taking the said account, be paid by the said defendants to the said William Greening Martin and William Annison as such churchwardens as aforesaid, and it is ordered that the said Master do inquire and state whether the said defendants, or any of them, have in their or any of their possession, custody or power, any and what deeds, documents, books, accounts, evidences or writings belonging to the said lands, and it is ordered that the said defendants do deliver the same to the said [*222] William Greening Martin and William Annison *as such churchwardens as aforesaid. And it is ordered that the said defendants do pay unto the relators their costs of this suit to be taxed by the said Master.

ELIZABETH THE WIFE OF JOHN PRICHARD BY HER NEXT FRIEND
v. GEORGE AMES AND THE SAID JOHN PRICHARD

ROLLS.—1823: 20th June.

A legacy given to a married woman "for her own use and at her own disposal" vests in her as separate estate.

BEFORE *Graham*, Baron, and Masters *Alexander* and *Cox*, for the *Master of the Rolls*.

 1823.—*Prichard v. Ames.*

The bill in this cause stated, that Mary Bold, by her will, bequeathed to the plaintiff, the sum of 240*l.* "for her own use and at her own disposal," and appointed the defendant Ames to be her executor, and gave him full power to receive the residue of her estate for his own use. The bill submitted that the plaintiff was entitled to the legacy for her sole and separate use, and prayed that it might be paid to her.

The defendant John Prichard insisted, that he was entitled to the legacy in his marital right.

Mr. *Sugden*, for the plaintiff, cited *Kirk v. Paulin*,^(a) where a legacy to a married woman, to be at her disposal, was held to vest in her as separate estate.

*Mr. *Roupeil* for the defendant John Prichard :—The [*228] intention to give the property to the separate use of the wife, must be clearly manifested in order to defeat the marital right of the husband, *Lumb v. Milnes*.^(b) A legacy given to a married woman, "for her sole use and benefit," vests in her as separate estate; *Adamson v. Armitage*,^(c) *Ex parte Ray*.^(d) But where it is given only for her own use and benefit, the right of the husband is not excluded; *Wills v. Sayers*.^(e) *Roberts v. Spicer*.^(g) The expression "at her own disposal" cannot have a greater effect than the words "for her own use and benefit."

Mr. *Bridgman* for the executors.

Graham, Baron :—I cannot entertain a doubt upon this point; the necessary effect of these words is to give this legacy to the separate use of the plaintiff. The testatrix, in using the words "at her own disposal," has stated the effect she wished to be produced; her intention was to give the plaintiff that power of dis-

(a) 9 Vin. Abr. 95 pl. 43.

(b) 5 Ves. 517.

(c) Coop. CC. 283.

(d) 1 Madd. Rep. 199.

(e) 4 Madd. Rep. 409.

(g) 5 Madd. Rep. 491.

1823.—COPIS v. MIDDLETON.

position which the law does not give her. The words "at her own disposal" must be altogether rejected, if they are taken to mean nothing more than "for her own use."

[*224]

*COPIS v. MIDDLETON.

1823: 22d March and 1st July

Where two persons execute a bond, the one as principal, the other as surety, and no other assurance is executed at the time, the surety paying the bond debt is a simple contract creditor only of the principal.

It is a general rule that in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal; the rule, however, must be qualified, by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor.

Where a bond is given by principal and surety, and at the same time a mortgage is made for securing the debt, the surety, if he pays the bond, has a right to stand in place of the mortgagee.

THIS suit was instituted by creditors for the administration of the estate of John Knott, who died on the 28th of December, 1792, and by the decree made upon the hearing of the cause, dated the 25th of November, 1796, it was referred to the Master to take an account of the debts of the said John Knott, and it was ordered, that the Master should inquire and state to the court, whether the defendant Newman Knott had paid any and what debts of the said John Knott, as surety for him, or any and what money in respect of any such debts, and whether the said Newman Knott received any and what consideration, satisfaction or indemnity in respect of any or either of the said debts, and to what extent, together with the nature of such security, satisfaction or indemnity.

The Master by his report, dated the 20th of May, 1815, certified that the specialty debts of the said John Knott amounted to 16,085*l.*, and he further certified, that it appeared by the evidence brought before him, that the said Newman Knott became

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surety for the said John Knott to a considerable amount, and paid various sums of money on account of such suretiship, and that he did not find that the said Newman Knott received any consideration, satisfaction or indemnity in respect of any of such debts. In the schedule to his report, the Master included the representatives of the said Newman Knott, and one John Martin, as specialty creditors of the said John Knott, in respect of sums paid by the said Newman Knott and John Martin respectively, in discharge of the principal and interest of certain bonds entered into by them as sureties for the said John Knott, and he allowed interest upon such principal sums.

*The bonds in which Newman Knott was surety, [*225] were dated respectively the 8th of August, 1781, and the 10th of January, 1792, and were joint bonds, executed by him and the said John Knott, to Richard Fogden and Thomas Turgis respectively, and were conditioned for securing the respective sums of 800*l.* and 300*l.* The principal and interest remaining due upon these bonds was paid by Newman Knott after the death of John Knott. The bond in which John Martin was surety, was dated the 8th of October, 1791, and was also a joint bond, executed by him and the said John Knott to John Boniface, and conditioned for securing the sum of 250*l.* The principal and interest due upon this bond was paid by Martin in the lifetime of John Knott, and the bond was assigned to Martin.

These facts were brought before the court by two exceptions taken by the plaintiffs to the Master's report, by which it was insisted that the Master, under the circumstances, ought not to have considered as specialty debts the sums paid by the said Newman Knott and John Martin in respect of the specialty debts of the said John Knott, but ought to have considered such sums as simple contract debts only, and ought not to have allowed interest thereon, inasmuch as the said Newman Knott and John Martin, in making such payments, did, as the plaintiffs submitted, virtually cancel the bonds and specialties, and put them-

 1823.—*Copis v. Middleton*.

selves in the situation of simple contract creditors of the said John Knott.

The cause now came on upon the exceptions

Mr. *Martin*, Mr. *Wingfield* and Mr. *Pepys*, in support of the exceptions:—Where a bond is executed by principal and surety, it is quite clear that the surety paying off the debt be- [*226] comes at *law a simple contract creditor of the principal.

His remedy against the principal is by an *indebitatus assumpsit*, or an action on the case, and he cannot declare upon the bond. Upon what principle then can the surety be converted into a specialty creditor in equity, where there is no contract between the parties that he shall be so considered. The utmost remedy which courts of equity have afforded to sureties has been, to give them the benefit of all the continuing securities entered into by the principal for the payment of the debt, but when a bond is paid off, all remedy upon it is at an end; the surety cannot even compel an assignment of the bond; *Gammon v. Stone*,^(a) *Waffington v. Sparks*.^(b) There is no principle upon which a court of equity can consider the surety as a specialty creditor, and no direct adjudication upon the point can be found in print. The case of *Hotham v. Stone*,^(c) by which the Mas-

(a) 1 Ves. 339.

(b) 2 Ves. 569.

(c) The following note of this case is extracted from the register:—

HOTHAM v. STONE.

On the 12th of August, 1774, John Pytt and John Platt executed a joint and several bond to John Stock, conditioned for the payment of 1,000*l* and interest, and by a memorandum in writing, bearing even date with the bond, and signed by Pytt, it was declared that the name of Platt was inserted in the bond as a security for Pytt, and at his request, and that no part of the 1,000*l* was received by Platt, and Pytt promised to indemnify Platt against the bond and the interest thereof. In the month of August, 1775, John Platt died, having by his will appointed the defendant Partridge to be his executor: John Pytt died in August, 1776, and after his death the principal and interest due on the bond, amounting to 1,485*l*, was paid by Partridge, to whom the bond was delivered up.

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ter considered *himself to be bound, is not reported, [*227] but there was in that case a special agreement between the parties, and the decision was appealed from, and the appeal compromised; *Robinson v. Wilson*(a) does not amount to a decision, and the cases there referred to are distinguishable from the present. In *Gayner v. Royner*(b) the bond appears to have been accompanied by a mortgage; and the circumstances of *Parsons v. Briddock*(c) show that the point in question could not have arisen.

Mr. *Shadwell*, in support of the Master's report:—This case must be considered in two points of view, first, with respect to the bonds paid in the lifetime of the principal, and secondly, with reference to the case where *the bond was [*228] not paid by the surety till after the death of the princi-

By the decree in the cause it was amongst other things ordered, that the Master should inquire and state to the court the priorities of the respective incumbrances, annuities, and specialty debts, affecting the estates in question in the cause.

The Master by his report, dated the 6th of December, 1809, set forth several instruments by which John Pytt became seised in fee of the estates in question, and stated that the first incumbrance on the said estates was an annuity of 200*l*. granted by the said John Pytt to the defendant Robert Stone, and that the second incumbrance thereon was a debt of 400*l*. due to Richard Bowsher, by virtue of the said John Pytt's bond, dated the 10th of October, 1775; and after stating several other incumbrances affecting the said estates, the Master certified, that a state of facts had been carried in by Partridge, claiming to have the debt paid by him allowed as the second incumbrance upon the estates in question, but that upon consideration of the claim he had disallowed the same, inasmuch as he humbly conceived that the said debt was not any charge or incumbrance upon the said estates.

The defendant, Partridge, took an exception to the report, insisting that the Master ought to have allowed the claim as the second incumbrance on the estates.

The decree declares, that the defendant, Partridge, is entitled to stand as the second incumbrancer upon the estates in question, and directs an account to be taken of what is due to him for principal and interest by virtue of the bond. Reg. lib. 1809, A. 2, 1335.

(a) 2 Madd. Rep. 464.

(b) Search has been made for this case in the register, and it cannot be found.

(c) 2 Vern. 608.

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pal. In the first case, although the bond debt was extinguished at law, the surety would be a specialty creditor, because a court of equity would keep alive the bond for his benefit, and on the principal on which it interferes to prevent legal bars from being set up, would permit an action to be brought upon the bond, and restrain the principal from setting up the payment.—[*Lord Chancellor*: Did you ever hear of such an injunction?] In the other case there is still further reason to consider the surety as a specialty creditor, because it was competent to the creditor, after the death of the principal, to have proceeded against his estate, and then the surety might have filed a bill to have the benefit of that proceeding. In *Wright v. Morley*(a) Sir William Grant decided, that the surety has precisely the same rights as the creditor. *Robinson v. Wilson* is the only case which bears upon the point, and although no final judgment was given, the opinion of Sir Thomas Plumer was in favor of the surety. It may fairly be inferred that the principal agreed to indemnify the sureties, and the circumstance of the sureties not having taken counter-bonds is a defect in form against which this court ought to relieve.

THE LORD CHANCELLOR:—I take the present case to be simply this, upon loans of money to A., joint bonds were given by A. and B.; B. being surety for A., two of the bonds were paid off by B. in the lifetime of A.; now if one of two joint obligors, being a surety, pays off the debt in the lifetime of the principal, he is at law merely a simple contract creditor of the principal, and if the principal lives for twenty years after the payment of the debt, he continues during all that time to be at law [*229] a simple contract creditor only, *then the question is, whether by the death of the principal, he is to be converted in a court of equity into a specialty creditor against his assets. With respect to the bond paid off after the death of the principal, the questions are, whether, inasmuch as at the death of the principal there was money due upon the bond, there was

(a) 11 Ves. 12.

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an equity on the part of the surety to compel the creditor to go in against the assets of the principal, and whether, there having been no interposition for that purpose, the right of the surety to stand in the place of the creditor can now be maintained. When it is considered that this was a joint bond, and that no action at law could be maintained except against the surety, the surviving debtor, it is a strong proposition to say, that the surviving debtor is to be considered in equity as a specialty creditor against the assets of the deceased debtor. With regard to the case before Sir Thomas Sewell, it does not appear to me to bear at all upon the point in question; in that case there was a bond and mortgage, and the cases where there is a bond only and a bond and mortgage are quite different. It is a general rule that in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal, but then the nature of those securities must be considered; when there is a bond merely, if an action was brought upon the bond, it would appear upon oyer of the bond, that the debt was extinguished; the general rule, therefore, must be qualified, by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor; in the case, for instance, where in addition to the bond there is a mortgage, with a covenant on the part of the principal debtor to pay the money, the surety paying the money would be entitled to say, I have lost the benefit of the bond, but the creditor has a mortgage, and I have a right to the benefit of the mortgaged estate, which has not got back to the debtor; there is a *great [230] difference between *Sir Thomas Sewell's Case* as stated in the argument and in the judgment; Sir Thomas Plumer says it establishes, that a surety paying a specialty debt has a right to be considered as a specialty creditor of the principal, but that does not at all follow from the statement of the case. There is another distinction between the present case and the case before Sir Thomas Sewell, that the mortgage was in that case created at the same time with the bond; so in *Wright v. Morley* there was a trust coeval in creation with the suretiship, and the question was, whether the trust fund was not by contract between

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the parties first to be resorted to. There was no final judgment in *Robinson v. Wilson*, which detracts from its authority. The authority of *Hotham v. Stone* is as great as that of a single judge can be, but there was an appeal from the decision, attended by a compromise, which seriously affects the case. I confess that I was astonished to hear that it had been decided, that when there was merely a bond, and payment of the bond, without more, the surety was to be considered as a specialty creditor; it was a common thing in bankruptcy, before the late Acts of Parliament enabling the surety to prove, for the creditor to go in and prove the debt when the principal became bankrupt, and then the surety took the benefit of the proof, but if the surety paid the debt before the creditor went in no proof could be made; when the creditor would not prove, some one was found to purchase the bond, an assignment was made, and the purchaser went in and proved for himself.

July 1st.—THE LORD CHANCELLOR:—The facts of this case are simply these, two individuals gave a bond, the one as principal, and the other as surety; no other assurance was executed at the time, no mortgage was made to secure the debt, [*231] no counter-bond was given *by the principal to the surety; and the question to be decided is, whether the surety, having paid the bond after it was due, is a simple contract, or a specialty creditor. I understand it to have been the opinion of the Master, an opinion founded on one or two cases which have been stated, that the surety was to be considered as a specialty creditor to stand in the place of the person whom he paid; that doctrine appears to me to be contrary to all that has been settled during the whole time I have been in this court; everything that was arranged in bankruptcy before the late statute enabling the surety to prove, everything determined before appears to me to have authorized the court to consider it quite clear, that if there was nothing in the case beyond what I have stated, the surety, having paid the bond, could be nothing more than a simple contract creditor in respect of that payment; the bond was not assigned to anybody in consideration of a sum

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of money paid, which was one way we used to manage these things; there was no counter-bond given, which was another way in which we used to manage these things, so that if the surety paid one bond he became instantly a specialty creditor by virtue of the other bond. If any suit was now instituted, I apprehend the payment of the bond would show that the bond was gone. There has been a case cited where, upon the general ground that a surety is entitled to the benefit of all securities which the creditor has against the principal, it seems to have been thought that the surety was entitled to be as it were a bond creditor by virtue of the bond; I take it to be exceedingly clear if, at the time a bond is given, a mortgage is also made for securing the debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee, and as the mortgagor cannot get back his estate again without a conveyance, that security remains a valid and effectual security, notwithstanding the bond debt is paid; but if there is nothing but the bond, my *notion [*232] is, that as the law says that bond is discharged by the payment of what was due upon it, the bond is gone, and cannot be set up. That is the opinion which I have formed of this case.

Exceptions allowed.

ANGERSTEIN v. MARTIN.

1823: 21st June and 5th July.

Testator, having devised lands to A. for life, remainder to his children in strict settlement, directs the residue of his personal estate, subject to the payment of debts and legacies, with all convenient speed to be laid out in the purchase of lands, to be settled forthwith to the same uses, with a proviso, that the trust moneys, until they should be laid out, might be invested upon government or real securities, the dividends and interest of which were to go and be paid as the rents of the lands to be purchased would go and be payable; a large portion of the testator's personal estate, not required for the payment of debts and legacies, being invested in the funds, and upon securities carrying interest, the tenant for life was held entitled to the interest of that portion from the death of the testator.

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Executors may pay legacies, or hand over the residue, within the year after the death of the testator.

JOHN JULIUS ANGERSTEIN, by his will dated the 16th of January, 1823, gave and devised all his freehold estates in the counties of Norfolk, Lincoln and Suffolk respectively to Sir George Martin and Andrew Henry Thompson and their heirs, to the use of John Angerstein for life, remainder to the uses after mentioned, that is to say, as to the estates in the county of Norfolk, to the use of John Julius William Angerstein, the eldest son of the said John Angerstein, for life, remainder to his first and other sons successively in tail male, remainder to Frederick Angerstein, the second son of the said John Angerstein, for life, remainder to his first and other sons successively in tail male, remainder to William Angerstein, the third son of the said John Angerstein, for life, remainder to his first and other sons successively in tail male, remainder to Caroline [*233] and Elizabeth, the daughters *of the said John Angerstein, for their lives successively, and to their first and other sons successively in tail male, remainder to the heirs and assigns of the said John Angerstein forever; and as to the estates in the counties of Lincoln and Suffolk respectively, the testator devised the same, after the death of the said John Angerstein, to the like uses, except that the estates in the county of Lincoln were first limited to the use of the said Frederick Angerstein and his first and other sons successively, and those in the county of Lincoln to the use of the said William Angerstein and his first and other sons in like manner. The testator then gave several annuities and pecuniary and specific legacies, and he gave all his stocks, funds, money, securities for money and all the residue of his personal estate, subject to the payment of his funeral and testamentary expenses, debts, legacies and annuities to the said Sir George Martin and Andrew Henry Thompson, their executors, administrators and assigns, upon trust to sell all such parts of his residuary personal estate as should be in their nature saleable, and to collect and receive all such parts thereof as should not be so and to stand possessed of

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the moneys to arise from the sale, and, also, the moneys which should be collected upon trust as to four tenth parts thereof, with all convenient speed (with the consent of the said John Angerstein during his life, and after his decease with the consent of the person for the time being in possession of the estates in the county of Norfolk, under the limitations thereinbefore contained) to lay out and invest the same in the purchase of lands, and forthwith to convey, settle and assure the lands so to be purchased, to the uses thereinbefore declared of and concerning the said last-mentioned estates; with a proviso that in the meantime, and until the said four-tenth parts of the said trust moneys should be laid out and invested in a purchase or purchases in the manner thereinbefore mentioned, it should be lawful for the trustees, with such consent as aforesaid, from time to time to place out and *invest the same in their [*234] names in the public stocks or funds, or upon government or real security at interest, and to alter, vary and transpose such stocks, funds and securities, and that the dividends, interest and annual proceeds arising from such stocks, funds and securities should from time to time go and be paid to such person or persons, and be applied to such uses, intents and purposes, and in such manner as the rents and profits of the hereditaments to be purchased with the moneys invested thereon would go and be payable or applicable, in case such purchase or purchases were actually made; and as to three other tenth parts of the said trust moneys, and as to the three other remaining tenth parts thereof, the testator directed the trustees to stand possessed thereof, upon trust to invest the same in the purchase of lands, to be settled to the same uses as were thereinbefore respectively limited and declared of and concerning his estates in the counties of Lincoln and Suffolk, with a like power to invest such moneys on such securities as aforesaid, and to vary the same, and the dividends and interest thereof were in like manner to go and be paid to such person or persons as the rents of the hereditaments to be purchased therewith would go and be payable; the testator appointed the said Sir George Martin and Andrew Henry Thompson to be the executors of his will.

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The testator died on the 29th of January, 1823, leaving the said John Angerstein his only son; the several children of the said John Angerstein named in the will of the testator were living at the time of his decease, but none of them had any issue.

The testator at the time of his death was possessed of a very large personal estate, consisting among other things, of money in the public funds, and of money due to him on securities carrying interest; and after providing for the payment of his [*235] debts and funeral expenses, and of *the legacies and annuities given by his will, the interest of the clear residue of the testator's personal estate in the hands of his executors amounted to many thousand pounds per annum.

The bill was filed by the said John Angerstein, within a year after the death of the testator, against his children, the tenants for life in remainder, and against the executors, for the purpose of having the question determined, whether the plaintiff was entitled to the annual interest of the clear residue of the testator's personal estate from the time of his death, or whether the amount of such interest during the first year after the testator's death, formed part of the general residue of the testator's personal estate, for the benefit (after the expiration of the first year) of the plaintiff during his life, and of the devisees in remainder after the decease of the plaintiff; the bill prayed, that it might be declared by the court, that the plaintiff was entitled to receive and be paid for his life the amount of the annual interest or yearly produce of the clear residue of the testator's personal estate, from the time of the said testator's death; and that, if necessary, the usual accounts might be taken of the testator's personal estate and effects, and the clear residue thereof ascertained and secured during the plaintiff's life, in such manner as the court should direct.

The defendants, the executors, by their answer stated, that the testator was at the time of his death possessed of several sums in the public funds of this country, only part of which could be

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required for the payment of his funeral and testamentary expenses, debts, legacies and annuities then remaining unpaid; and that he was also possessed of property to a large amount in the Russian funds, no part of which could be required for the purposes aforesaid; and they further stated, that in case an eligible estate should be offered for sale, they were prepared to advance *300,000*l.* for the completion of the purchase, and [*236] to settle the estate to the uses of the testator's will, and they submitted to the court, that if such a purchase and settlement had been made, the plaintiff would have been entitled to the rents of the settled estate from the date of the agreement for the purchase.

Mr. *Hart* and Mr. *Barber* for the plaintiff:—If it be the principle of this court that a will must be construed according to the intention of the testator, it is strange to say, that where the produce of personal estate is given for life, the tenant for life is not to enjoy it during the first year, when the produce of that year may be the whole benefit which the tenant for life may derive from the bequest. In *Stott v. Hollingworth*(a) the Vice-Chancellor held, that the first year's interest of the residue formed part of the capital, but that case was decided without reference to authorities, and the judgment appears to have proceeded upon a supposed resemblance between the case of pecuniary and residuary legatees; without remarking upon the legitimacy of the reasoning in that case, there are many authorities which expressly contrast the case of a pecuniary legacy, with that of a residue. In *Taylor v. Hibbert*,(b) which follows the decision in *Stott v. Hollingworth*, the Master of the Rolls seems to have acted upon a mistaken view of *Sitwell v. Bernard*,(c) which he refers to in the judgment as having established a general rule; the decision in *Sitwell v. Bernard* involves no such general rule as has been attempted to be extracted from it; the testator in that case directed an accumulation to an undefined period, the interest of his personal estate to become capital till the purchase

(a) 3 Madd. 161.

(c) 6 Ves. 520.

(b) 1 Jac. and Walk. 308

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[*237] of real estate, and the court only held, that the *testator must have contemplated a time when the accumulation should cease; the reasoning in *Sitwell v. Bernard* applies only to cases where the testator has said the residuary legatee shall not enjoy even the interest till a future time, and not to the converse of that case, where the testator has expressly declared that the residuary legatee shall enjoy the interest from his death. In *Fearns v. Young*,(a) which is subsequent to *Sitwell v. Bernard*, your Lordship declared that there was no rule settled on the point. If the tenant for life, according to a settled rule, can take nothing during the first year, the decision in *Gibson v. Bott*(b) is erroneous. The rule that a pecuniary legacy shall not carry interest within a year after the death of the testator, when the testator has left the question open, and has not intimated his intention, is only for the convenience of the executor; it is no breach of the duty of an executor, notwithstanding the rule, to pay the legacy within the year, if he is satisfied that the assets are sufficient; the circumstances of this case show that the testator intended his son to enjoy the property from the time of his death.

Mr. *Pepys* for the children of the plaintiff, the legatees in remainder:—There are two ways of considering this case, first whether there is any general rule upon this subject, and secondly whether this case forms an exception to the general rule. The judgment in *Sitwell v. Bernard* has always been considered as establishing the principle, that the tenant for life of a residue is entitled to the interest only from the end of a year after the death of the testator; and that principle has been recognized and acted upon in *Taylor v. Hibbert*, *Stott v. Hollingworth* and [*238] **Griffith v. Morrison*.(a) It is true that the will in *Sitwell v. Bernard* contained a direction to accumulate, but the court held, that the direction to accumulate should not operate to the prejudice of the tenant for life, and therefore, that it should not operate at all; and then the question arose from what time the tenant for life should be entitled to the interest; the court determined that he was entitled to the interest from the end of

(a) 9 Ves. 549.

(b) 7 Ves. 89.

(c) 1 Jac. and Walk. 311.

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a year after the death of the testator, by analogy to the time fixed for giving interest upon pecuniary legacies. If the first year's interest is given to the tenant for life, insurmountable difficulties may arise, as the executors may be involved in debts and liabilities of the testator which require time to be adjusted. There are no circumstances in this case to take it out of the general rule.

Mr. *Martin* and Mr. *Farrer* for the executors.

THE LORD CHANCELLOR:—The case of *Sitwell v. Bernard* cost me an infinite deal of trouble. My only doubt was whether I was not too bold in overruling the testator's intention, to the extent of restraining the accumulation to one year after his death. In that case I merely decided, that though there was a direction for accumulation, the tenant for life should not be kept out of the interest beyond the year. If I went any further, and gave reason to think that I meant to lay down any such general rule as is now contended for, I can only say, that I did not use my usual caution in guarding myself from being misunderstood. *Sitwell v. Bernard* was the very converse of this case; there the testator's personal estate was so affected by circumstances, that it was impossible to bring it together for several years; there was a direction to lay out the capital *with the [*239] accumulation in land; it follows of course that there could be no direction, like that in the present case, that the interest in the meantime should go to the tenant for life. The Master of the Rolls has either mistaken my meaning in that case, or I have mistaken the effect of my own decision; for in *Fearn v. Young*, I expressly stated that I did not consider the rule as settled; In *Gibson v. Bott* I did not consider that there was any rule against my acting as I did; *Sitwell v. Bernard* and *Stott v. Hollingworth* differ extremely, there was no direction in the latter case to lay out the money in land, nor any direction as to the interest of the money. I should not have decided *Stott v. Hollingworth* without hearing a most elaborate argument on both

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sides. I must look at the case of *Sitwell v. Bernard* before I give my judgment.

July 5th.—The LORD CHANCELLOR stated the will, and observed that the plaintiff was clearly entitled to the rents of the testator's real estates from the time of his death, and that if the trustees in the course of the year after the death of the testator laid out the whole of the personal estate in the purchase of lands, it would be extremely difficult to say, that the plaintiff would not be entitled to the rents of those lands from the time of the purchase. His Lordship further observed, that the proviso enabling the trustees to lay out the money in the stocks, or upon real security, authorized them to continue it upon existing mortgages, and he then proceeded in the following terms.

I take the cases of *Sitwell v. Bernard*, *Entwistle v. Markland*,^(a) and *Stuart v. Bruere*,^(b) not only not to govern this case, but to be directly the converse of it. In all those cases an accumulation was directed, and the intention was, that the intermediate rents and profits, till the purchase was made, should form part of the moneys to be laid out; no person was to take any in-
 [*240] terest till the trusts *with respect to the purchase were completed, and those trusts could not be completed, till the intermediate profits were laid out. In *Sitwell v. Bernard* the question was what the court was to do, where the testator directed the interest to accumulate and be laid out with the principal, and the court held, that the direction for accumulation should only operate for one year, and that although the personalty remained as personalty, it should at the end of the year be considered as converted; that the beneficial enjoyment should be the same as if the conversion had been made.

That decision appears to me to have been right, even supposing the case to have been an original one, the more so as it followed the previous cases before Lord Loughborough and Lord

(a) 6 Ves. 528.

(b) 6 Ves. 529.

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Thurlow. The principle upon which the court proceeded in that case was this, that such a conversion must be made as was most for the benefit of all parties, and that by compelling the trustees to proceed with all diligence to get in the personal estate, to arrest mortgagors, file bills of foreclosure, sue upon bonds, the accumulation would in all probability be much less than if more temperate proceedings were taken; the court, therefore, in that case, contemplating all the difficulties which belonged to such a trust, cut the knot, and said that after the end of a year the accumulation should cease, and what was real should be enjoyed as real, and what was personal should be enjoyed as personal. Those cases essentially differ from this, in which the testator directs, that when the personal estate shall be collected, not that the interest thereafter to arise shall be laid out with the principal, but shall be enjoyed by the person entitled to the rents and profits. The question then is, whether, as the testator has given the tenant for life an immediate interest in the real estates, and has directed that if in the course of the year an estate shall be bought, the tenant for life shall be entitled to the rents from the *time of the purchase, although [*241] the year has not elapsed, and has also directed as to the personal estate, that it shall be laid out on mortgage, or in the stocks, a direction which would not compel the trustees if they found money on good security to call it in, there can be any inconvenience in saying, that the tenant for life is entitled to the interest of the personal estate from the death of the testator; this case is clearly distinguishable from those to which I have referred, and I think with respect to the interest of so much of the personalty, bearing interest, as is not necessary to be applied for the payment of debts or legacies, the tenant for life is entitled to it from the death of the testator. I know of no case which prevents executors, if they choose, from paying legacies, or handing over the residue within the year, and if it is clear, *currente anno*, that the fund for the payment of debts and legacies is sufficient, there can be no inconvenience in so doing.

1823.—Hewitt v. Hewitt.

HEWITT v. MORRIS.(a)

1822: 1st August. 1823: 12th March.

Testator directs his executors to invest the residue of his estate, after payment of debts and legacies, in the funds or upon securities, the interest to be paid to A. for life, and after his death the principal to be held upon trusts for his children; the tenant for life was held to be entitled to interest, accruing within the year next after the testator's decease, upon funds on which the testator's property stood invested at the time of his death, and which were not required for the payment of debts and legacies.

ROBERT HEWITT by his will, dated the 13th of February, 1810, after giving several pecuniary and specific legacies, gave and bequeathed to his executors the residue of his estate and effects, upon trust to convert into money all such parts [*242] thereof as should not consist of *money or stocks, and after payment of his debts and legacies, to invest his said residuary estate and effects in the purchase of government or other stocks, funds or securities, and to stand possessed of the said stocks, funds and securities so to be purchased and acquired, as to one moiety thereof, upon trust to pay the interest, dividends and annual proceeds, as and when the same should from time to time arise and be received, to William Hewitt for life, and after his death, to pay an annuity to his widow for her life, and subject to the annuity upon certain trusts in the said will mentioned for the benefit of the children of the said William Hewitt, and for default of issue of the said William Hewitt, then upon the like trusts for the benefit of the children of John Hewitt; the testator then bequeathed the other moiety of the said stocks, funds and securities to John Hewitt for life, with limitations after his decease for the benefit of his widow and children, similar to those before declared as to the first-mentioned moiety in favor of the widow and children of the said William Hewitt, and he

(a) From the resemblance of this case to *Angerstein v. Martin*, and its importance to the profession, it has been thought convenient to give it immediate publication without regard to the date of the decision.

1823.—*Hewitt v. Morris*.

appointed Thomas Morris, George Wren Le Grand, James Hartlett and John Munton to be his executors.

The testator died on the 24th of September, 1820, and the said William Hewitt and Sarah his wife, John Hewitt and Anne his wife, and several children of the said John Hewitt, survived him, and joined in instituting this suit against his executors.

By the decree made on the hearing of the cause, on the 12th of August, 1822, it was referred to the Master to take the usual accounts of the testator's personal estate, and by a separate report, dated the 25th of February, 1823, the Master certified that all the debts of the testator had been paid.^(a)

*The said William Hewitt having died without hav- [*243]
ing had any children, on the 11th of February, 1823,
and having by his will appointed the plaintiff, Sarah Hewitt, to
be his executrix, a petition was now presented by the said Sarah
Hewitt, and by the plaintiff, John Hewitt, stating that the de-
fendants, the executors, had in hand, on account of the interest
accrued due on the testator's estate within the year next after
his decease the sum of 374*l.*, which they submitted to pay as the
court should direct; and inasmuch as the said sum of 374*l.* was
interest and dividends accrued due on the stocks or funds in
which the testator's property was invested at the time of his
death, and did not arise from any investment of the testator's
estate made by his executors subsequent to his death, the peti-
tioners submitted that they were entitled under the trusts of the
testator's will to have the same paid to them in equal shares,
and prayed that it might be paid to them accordingly.

Mr. *Sugden*, in support of the petition, argued that there was
a distinction between pecuniary legacies and residuary bequests.
He referred to *Angerstein v. Martin*, and stated that the decision

(a) It did not appear by the petition, but it was stated at the bar, that the lega-
cies had also been paid.

 1823.—Hewitt v. Morris.

of the Vice-Chancellor in *Stott v. Hollingworth*(a) was appealed from, and that the case was afterwards compromised.

Mr. *Hart*, against the petition, distinguished the case from *Angerstein v. Martin*, there being no direction to lay out the money in land, and contended that there could be no question upon the subject if *Stott v. Hollingworth* constituted the law of the court; he mentioned *Taylor v. Hibbert*,(b) and admitted that in *Angerstein v. Martin* the court had expressed an opinion that *Sitwell v. Bernard*(c) had no application to the point in question.

[*244] *THE LORD CHANCELLOR:—I must read this will; *Sitwell v. Bernard* turned entirely upon its peculiar circumstances, and instead of authorizing the decision in *Taylor v. Hibbert*, was directly the converse of that case. In *Sitwell v. Bernard* there was an express direction that the interest should accumulate, and the court put a stop to the accumulation at the end of one year; to have come to a contrary decision in *Angerstein v. Martin*, I must have gone the length of saying that if a real estate was bought in February, the tenant for life would not have been entitled to the rents. I understand an observation has been made that that case was an exception out of the general rule, my only comment upon that is, that the general rule never had anything to do with it.

1823: *March 12th.*—THE LORD CHANCELLOR:—The question in this case is whether, upon the true construction of this will, the tenant for life is to have the interest which proceeds from the fund, so far as it is not necessary to be disturbed for the payment of debts and legacies, from the death of the testator, or whether that interest for the first year is to be added to the bulk of the residue; my opinion upon this will is, that the tenant for life is entitled to that interest. *Sitwell v. Bernard* appears to have been much misunderstood, at least as to what I meant by

(a) 3 Madd. 161.

(c) 6 Ves. 520.

(b) 1 Jac. Walk. 308

 1823 —Chichester v. Sheldon.

it; in that case there was an express direction that the interest should accumulate, and be laid out in the purchase of land, and the question was not whether the parties to take for life were to take from the death of the testator, but where the accumulation was to stop, regard being had to the fact that if it was not stopped somewhere, the tenant for life might have no benefit at all; the court could not, against the express directions of the will, say that the tenant for life should *be enti- [*245] tled from the death of the testator, but it being clearly intended that he should have some benefit, it was necessary to fix a time from which he should be entitled; I cannot infer from what I have done in one case as to stopping the accumulation of interest; that the interest is to accumulate in another; I, therefore, think that the prayer of this petition is right and must be granted.

CHICHESTER v. SHELDON.

ROLLS.—1823: 7th July.

Wood springing from the roots or stools of trees is tithable, and neither its own age, nor the age of the trees from the roots or stools of which it sprung, will exempt it.

Tithe of wood is due of common right.

There may be a prescription *in non decimando* for a district; or even for a hundred. Where a prescription *in non decimando* is set up, the party must show the specific ground upon which he claims to prescribe.

THIS was a bill filed by the impropriate rector of the parish of Llanbadarnfaur, in the county of Cardigan, for the tithes of wood. The defendants, by their answers, insisted that no tithes of wood of any description within the said parish were due or of right payable to the plaintiff, and stated that they believed that no tithes had been within the memory of man ever paid or rendered for any wood felled or cut down within the said parish, or the tithable places thereof, or within any other parish or place within the said county of Cardigan.

The evidence adduced by the plaintiff proved that the defend-

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ants had cut down quantities of wood and underwood, which grew from the roots or stools of trees which had been formerly cut down. On the part of the defendants, several witnesses were examined, whose testimony tended to establish a general belief and reputation that no tithe of wood grown in the parish of Llanbadarnfawr, or in the county of Cardigan, was due or payable; and it was proved that a great part of the wood which had been cut down by the defendants was of more than twenty years' growth.

[*246] *Mr. *Shadwell* and Mr. *Barber* for the defendants.

The question is, whether a sufficient defence may not be made to this suit upon one of these grounds, either that there is a prescription *in non decimando* for the county of Cardigan, or that the wood, in respect of which tithe is demanded, sprung from ancient roots, or was of more than twenty years' growth. Upon the latter ground no tithe can be demanded for the great proportion of the wood which has been cut; where such a tree as is timber by the general law of the land, or by the custom of the country, is not cut down till it is upwards of twenty years' growth, the age of the tree exempts it from tithe, and it is immaterial whether it has sprung from an old stool or not. The only question is, whether tithe is due for germins cut down under twenty years' growth, when sprung from the roots of trees not cut down till upwards of twenty years' growth; to bring this point before the court an inquiry must be directed, at what ages the trees were cut down from the roots of which the germins have sprung. In point of law, it is quite clear that there may be a prescription *in non decimando* for a county or a hundred; Doctor and Student, 325; Brook's Abr.; Title Dismes, pl., 14; Coke's Second Institute, 345; *Hicks v. Woodson*, 1 Lord Raymond, 137; 4 Mod. Rep. 336; Gwill. 550. There is no reason why this prescription should not prevail for the county of Cardigan, as well as for the weals of Kent, Sussex and Surrey. No objection can be made to the mode in which the prescription is laid by the answer; it is the acknowledged rule in tithe causes

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that it is sufficient if the defendant has so stated his case, as that the plaintiff may know what it is he has to contend with.

Mr. Sugden, Mr. Lynch and Mr. R. V. Richards for the plaintiff.

The defence put upon the record is a prescription *in [*247] *non decimando* for the county of Cardigan. The answer states merely the fact that no tithes of wood have been paid in the parish or the county; is that the proper mode of pleading a prescription *in non decimando*? The particular ground of exemption ought to have been stated; if a defence thus pleaded is allowed to prevail, the principle of all the cases will be subverted. The only authority in favor of the position, that no tithe is due for germins sprung from roots which originally carried timber trees of more than twenty years' growth, is the passage in the Second Institute; (a) Lord Hardwicke has expressly denied the authority of that passage in *Walton v. Tryon*, (b) and the cases uniformly contradict it. *Turner v. Smith*, (c) *Walbank v. Hayward*, (d) *Lewis v. Snell*, (e) *Ford v. Racster*. (g)

*The latter case establishes this point, also, that germins sprung from roots, whatever be their age, are subject to tithe; no germin can by age acquire an exemption. [*248]

(a) 2 Inst. p. 43.

(c) 2 Gwill. 529.

(b) 2 Gwill. 827; Ambler 130.

(d) Wood's Tithe Causes, 512.

(e) A note of this case, which is referred to in *Ford v. Racster*, is subjoined.

LEWIS v. SNELL.

[In the Exchequer Mich. Term, 1811.]

The rector of Chingford in the county of Essex claimed the tithes of the parish in kind, and particularly the tithes of wood and underwood, and stated that the defendant Snell was in the years 1806 and 1807, the proprietor of certain woods and pieces of wood grounds lying in the parish, and that in the year 1807 he sold part of the wood therein growing to the defendant, Parker, and that both the defendants had cut wood growing as well from the old stubbs as from other trees, and had refused to pay any tithes.

The defendants by their answer stated, that since the month of December, 1806, the defendant Snell had been the proprietor of several woods in the parish, and

(g) 4 M. & S. 130.

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[*249] *THE MASTER OF THE ROLLS:—This is a bill filed by an impropriate rector for the tithes of wood; the title of the rector is proved, and he is therefore *prima facie* entitled to this tithe, as there can be no doubt upon the authorities that the

amongst others, of two groves called Taverner's Grove and Pollard's Grove, and that in the month of April, 1807, being desirous of having all the wood and underwood then standing in the said two groves grubbed up, in order that the same might be converted into arable land, he agreed with the defendant Parker to sell to him all the timber, trees, pollards and underwood then standing thereon. The defendants further stated, that one of the said groves had been since grubbed up, and that the other was in the act of being grubbed up, and that the wood purchased by the defendant, Parker, consisted of oak and hornbeam timber, and also of pollards and young trees and tellers, and of a small quantity of underwood, and that some of the pollards in the groves had tops of small value, and some of the tellers were from old stubbs, but that an equal quantity thereof were young timber trees sprung from acorns; and the defendants insisted, that the plaintiff could have no right or title to any produce of the said groves and woods, save only as to the said underwood, and as to such tellers as were thereafter mentioned, such produce having consisted of timber of upwards of twenty years' growth, and of wood growing from old stubbs and stools of timber, and which being about thirty-two or thirty-three years old at the least, ought to be deemed and considered as timber, and as such not tithable, and also of pollards, which being of near a century old or thereabouts ought therefore to be deemed and considered as coming within the same denomination; and with respect to the tellers the defendant Snell said, that if any such had been cut down under the growth of twenty years, he submitted that the same were not tithable, by reason that the same were cut down before their maturity merely for the purpose of grubbing up the groves, and converting them into arable land. The defendant, Parker, then stated that the principal part of the pollards and other wood purchased by him had been sold and used for the purposes of firewood and billet wood.

The plaintiff replied, the defendant rejoined, and witnesses were examined on both sides.

By the decree it was referred to the deputy remembrancer to take an account of what timber trees had been cut down, topped or pollarded on the lands of defendant, Snell, within the parish of Chingford, since the defendant, Snell, came into the possession of the estates and premises whereon the same were growing, which were under the growth of twenty years, and of the value thereof; and also to take an account of what coppice wood and underwood had been cut down by the defendants from the period aforesaid, and of the value thereof; and also to take an account of what germins had been cut by the defendants from the stools of trees above twenty years' growth, and whether any and what part thereof had been cut from stools above twenty years' growth mixed and cut with coppice and underwood, and

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tithe of wood is due of common right; with respect to underwood and coppice wood particularly, it has been determined, that notwithstanding they do not yield an annual increase, yet inasmuch as they are cut periodically, they are in the proper sense articles which yield an increase, and are tithable. In this case, therefore, it is upon the defendants to show some reason why they are exempt from the payment of these tithes. The first ground of defence is a prescription *in non decimando*, which is stated in a manner not very usual in cases of this nature, it being alleged merely, that no tithes of the description sought by the bill have ever been paid in the parish, or in the county of Cardigan. The first question to be considered is, whether *the mode adopted in this answer, is the proper [*250] mode of stating such a defence. The court has never been in the habit of yielding easily to claims of this description; in other cases of customs, where a *modus*, for instance, is payable, it is a different thing, there is some equivalent: but where a defendant insists upon paying nothing, it being directly contrary to the law of the land, the court holds him strictly to make out his title. It is true that the uniform tenor of the books is, that for a district, or even so far as a hundred, a party may prescribe *in non decimando*: but though the doctrine is generally

also to take an account of the bark had and stripped by the defendants from any of the trees belonging to the defendant Snell, since the same period (except such as were timber trees) and of the value thereof.

The Master, by his report, found that a large quantity of coppice wood and underwood had been cut down by the defendants since the period in the decree mentioned, to the amount in value of 915*l*.; and he also found, that since the same period a large quantity of germins had been cut down by the defendants from the stools of trees above twenty years' growth, growing upon the said lands, which germins were mixed and cut with coppice and underwood, hornbeam, pollards, maple, young trees, tellers and faggot wood; but he stated that no evidence having been adduced before him of the value of such germins, he had been unable to ascertain the same.

The cause was heard on further directions on the 15th of July, 1816, and a decree was made for payment to the plaintiff of a tenth part of the value of the coppice wood and underwood with costs.

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recognized, I know of no instance in which such a prescription has succeeded, except in the three counties of Kent, Sussex and Surrey. Whenever an attempt has been made to resist the right of the rector upon the ground of a prescription *in non decimando*, the court has been very careful to see, whether the defence was not founded upon an ignorance which prevailed as to the liability to tithes, and not upon any definite legal right. There are several instances of that, *Smith v. Johnson*,^(a) *Nagle v. Edwards*.^(b) If defences of this nature were given way to easily, that which proceeds from ignorance might very often be converted into a legal ground of defence, and prescriptions *in non decimando* established in every county in the kingdom. Upon these grounds, where a prescription *in non decimando* is set up, the court always calls upon the party to show a legal ground of defence, and to make it out clearly; he must not only state the fact that no tithe is due, or has been paid, but why it is not due, or has not been paid; he must bring forward the specific ground upon which he claims to be entitled to prescribe *in non decimando*. If he make out that it is by custom, he must state the custom, and put it distinctly in issue. In this case the party has stated merely the fact that no tithes have been paid, but has not stated [*251] why they have *not been paid. Even if it can be considered that a custom is put in issue, the evidence is too loose to establish it; for that purpose the party ought to have proved the falling of timber in every part of the county, that the exemption was claimed in particular cases, that the attention of the rector was called to it, and that the custom prevailed. There is not, therefore, a sufficient case made out to establish the claim *in non decimando*. The next ground of defence is, that the trees cut down are of more than twenty years' growth. There is no doubt that if trees be of the description, which by the general law of the land are timber, or which by the usage of the country are considered as timber, those trees, if they have never been cut at all, when cut down above twenty years' growth are not liable to tithe; the doubt is, whether the cuttings from the roots of

(a) Gwill. 606.

(b) Gwill. 1442.

1823.—*Chichester v. Sheldon*.

trees are privileged or not, according as the trees were cut down when above or under twenty years' growth. It is quite clear that so far as applies to the mast of a tree, if it be timber that was never cut at all till twenty years' growth, all its produce to time immemorial will be constantly privileged, because the tree once privileged, communicates that privilege to its germins for ever. The difficulty is as to the germins arising from the old stools. In the 2d Institute it is certainly laid down, that the germins from the roots are privileged, as well as those from the mast, but that point underwent very great consideration in *Walton v. Tryon*, and undoubtedly it was Lord Hardwicke's opinion that the passage in the 2d Institute was not law; that there was a distinction between the root and the mast; that the privilege did not attach upon the root, and that the germins cut from the old roots were forever liable. The distinction taken in that case may have been made for the purpose of protecting the rights of the church where they depend upon germins sprung from old stools, it being difficult to ascertain whether the stools belong to trees which did or did not acquire the privilege. Lord Hardwicke's decision in **Walton v. Tryon* has been followed in *Walbank v. Hayward*, and *Lewis v. Snell*; and in addition to these cases, there is the very strong authority of a court of law upon this subject. In *Ford v. Racster* the Court of King's Bench gave a direct decision in point, and this being a clear legal right, a court of equity should be cautious of setting up its own judgment against the unanimous decision of a court of law. There is a subsequent case of *Evans v. Roe* depending in the Court of Exchequer; that case was argued before the very learned Chief Baron,^(a) who thought that some doubt had been thrown over the authorities, and was desirous that the subject should be brought under the consideration of the whole court, which, I believe, has not yet been done. Notwithstanding the authorities to which I have referred, if the parties are anxious to have the point open, whether or not the rule is uniform that the germins must pay, whatever was the age of the tree from whose

(a) L. C. B. Richards.

1823.—*Chichester v. Lheldon*.

roots they have sprung, the Master may be directed to discriminate the ages of the trees; the defendants, however, must understand, that if such an inquiry is directed, they will take it at the peril of costs; the inquiry will be attended with expense, and it is a matter for the consideration of the defendants whether, if there is no probability that in the result the court can contradict the authorities, they will venture to take it. At all events there must be some inquiry, as it is not clear that some part of the wood cut down may not have been timber, above twenty years' growth, and not sprung from old stools.

The defendants afterwards declined taking the inquiry as to the ages of the trees from the roots of which the germins sprung, and the following decree was made.

His Honor doth order and decree, that it be referred to the Master to take an account of the tithes of wood which [*253] *has been felled and cut down, and which has been received and taken by the defendants or any or either of them, from the several farms and lands in their joint and several occupation, situate in the parish of Llandabarnfaur in the county of Cardigan, within six years before the filing of the plaintiff's bill in this cause, and up to the date hereof; and for that purpose it is ordered, that the said Master do ascertain how much wood has been cut down by the said defendants as aforesaid, upon the said farms and lands during the time aforesaid, and which sprung from stools or roots of trees, and what is the value thereof; and it is ordered, that the said Master do also ascertain how much wood, not growing from the stools and roots of trees (except oak, ash and elm, which attained the age of twenty years), has been cut by the said defendants as aforesaid, and during the time aforesaid, and what is the value thereof; and that the said defendants do pay unto the plaintiffs their costs of this suit, to be taxed by the said Master, together with what shall be found due from them on taking the accounts aforesaid.

1823.—Trim v. Baker.

TRIM v. BAKER.

1823: 8th July.

After a demurrer overruled, an order for time to answer merely, can be obtained only by a special application.

Where a demurrer is overruled, the defendant, at the time of its being overruled, may move for time to answer.

THE defendants having demurred to the bill in this cause, the demurrer was overruled, and five days afterwards an order was obtained, upon a motion of course, that three of the defendants should have a month's time, and the other defendants, who lived above twenty miles from London, six weeks' time to answer the bill. This order was discharged by the Vice-Chancellor for irregularity.(a)

*Mr. *Lovat* now moved, on the part of the defendants, [*254] to discharge the Vice-Chancellor's order.

Mr. *Romilly* opposed the motion.

THE LORD CHANCELLOR:—It is expedient that this point of practice should be finally settled. In a case which came before me in 1814, I was of opinion, that where a demurrer was put in which was overruled, the usual orders for time could not be obtained upon motion of course.(b) The present Master of the Rolls, in a case decided by him, was of a contrary opinion;(c) upon the best consideration which I have been able to give this case, I cannot help adhering to the opinion which I originally formed; if a defendant wants time originally, he must apply for time to answer, or to plead answer or demur, not demurring alone; the allegation contained in the order is, that the defendant is preparing his answer, a plea being for certain purposes

(a) 1 Sim. and Stu. 469.

(b) *Janes v. Saxby*, 1 Swanst. 194.

(c) *Griffith v. Wood*, 1 Ves. and Beam. 541.

 1823.—*Wilkinson v. Atkinson.*

considered as an answer. The question then is, whether, instead of following the usual course, a defendant is to say for himself I will demur alone, and then come to the court and ask for what it would not have given him originally without imposing a condition that he should not demur alone. It is said that if the demurrer is overruled, unless the order for time is granted upon a motion of course, the party may be immediately attached; my answer to that is, that there may be a special application; but then it is said there must be time to make that application; from that I dissent; my opinion has always been, that where a demurrer is overruled, the defendant, at the time of the demurrer being overruled, is entitled to submit to the court a motion for time to answer, and the court in its discretion will grant him the usual order for time to answer, or such time as it shall think proper, and will protect him against an attachment, if it ought to do so. It would lead to infinite delay, if a party could demur alone, and then take the orders for time to plead or answer upon motion of course.

Motion refused with costs.

JOHN WILKINSON AND OTHERS *v.* JOHN ATKINSON AND MARY ALCOCK. (a)

ROLLS.—1823: 15th July.

Where a testator, resident and domiciled at the time of his death within the province of York, disposes of all the residue of his personal estate, and names executors, but his disposition fails as to part of the residue, by the death of one of the residuary legatees in his lifetime, the share which thus becomes lapsed, will be apportioned between the widow and the next of kin, according to the Statute of Distributions, and will not be affected by the custom of the province.

WILLIAM ALCOCK by his will bequeathed all his personal estate, subject to certain legacies, to the defendant John Atkinson and four other persons, upon trust, in the events which happened,

(a) *See relations.*

1823.—*Wilkinson v. Atkinson.*

to pay his wife the defendant Mary Alcock, so long as she should live and continue his widow, an annuity of 200*l.*, and subject thereto, upon trust to assign and pay one-fourth part of his personal estate unto Elizabeth Bramley, her executors, administrators and assigns, for her and their own absolute use and benefit; the remaining three-fourth parts of his personal estate the testator gave to certain other persons, and appointed Atkinson and his co-trustees to be the executors of his will.

Elizabeth Bramley died in the lifetime of the testator, who left a widow surviving him; at the time of the testator's death he was resident and had his domicile within the [256] province of York; under these circumstances the question arose, whether the Statute of Distributions, or the custom of York, was to regulate the apportionment of Elizabeth Bramley's lapsed share of the residue between the widow and the testator's next of kin. By the statute the widow would have only a moiety of the share; if the custom prevailed she would be entitled to three-fourth parts of it.

The bill was filed by the surviving and the representatives of the deceased next of kin of the testator at the time of his death, praying that a moiety of that fourth part of the residue which was given by the will to Elizabeth Bramley might be distributed among them according to their respective rights.

The widow by her answer asserted her title to three-fourth parts of the lapsed share.

Mr. *Pemberton* for the plaintiffs contended, that the testator had made a disposition of all his personal estate within the words and meaning of the 4th William and Mary, c. 2, s. 2, and that the widow was by that Act excluded from claiming anything under the custom.

Mr. *Rolfe* for the widow.

Mr. *Alcock* for the executor.

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The cases cited were *Lawson v. Lawson*, (a) *Walton v. Walton* (b) *Beard v. Beard*, (c) *Southcot v. Watson*, (d) *Middleton v. Spicer*. (e)

[*257] *THE MASTER OF THE ROLLS :—The question is whether it is not clear, both on authority and on principle, that where an executor is named there is no intestacy; if there is no intestacy the operation of the custom is necessarily excluded. Where an executor is appointed, the legal property in the personal estate of the testator is given completely to him, and in this respect, so far as the present question is concerned, must not equity follow the law? Courts of equity have never said, that where executors are not beneficially interested in the estate, all the doctrine of intestacy is to be followed up, they have merely declared the executors to be trustees. On principle there is no ground for saying that there is any intestacy in this case, and it is only on the supposition of an intestacy that the operation of the custom can be introduced, for the statute of 4 William and Mary expressly excludes the widow from claiming under the custom, where the testator has made a complete disposition.

Independently of principle, authority I think has put the matter at rest. Lord Bathurst's judgment in *Lawson v. Lawson* is a positive decision, and is entitled to the greater weight, because when the point came first before him he entertained a different opinion. It is the latest case, there is no decision against it, and it is strongly confirmed by the language used by Sir William Grant in *Walton v. Walton*. The passage in which Lord Hardwicke is supposed to have expressed a contrary opinion, is a mere dictum which has never been followed up. Thus I consider it as a rule fixed both on principle and by authority, that where an executor is appointed, the custom does not apply.

(a) 7 B. P. C. 511.

(b) 14 Vesey, 324.

(c) 3 Atkyns, 72.

(d) 3 Atkyns, 226.

(e) 1 B. C. C. 204.

1823.—Adamson and others v. Hall.

*ROGER ADAMSON, JONATHAN FALDER AND JOHN GAS- [*258]
KELL v. CLAY HALL.^(a)

1823: 28th June and 22d July.

Where one of several plaintiffs dies before answer, a motion may be made by the defendant, that the surviving plaintiffs shall within a limited time revive the suit, or that the bill shall be dismissed with costs.

THE bill in this cause stated, that the plaintiff Roger Adamson was the proprietor of a house at Liverpool, of which the plaintiffs Jonathan Falder and John Gaskell were lessees; and that the defendant Clay Hall was the occupier of an adjoining house, and had erected a furnace for boiling soap against the party wall which separated the two houses. The bill then stated, that in consequence of the erection of the furnace, the plaintiffs were in great danger of having their property destroyed by fire, and had been compelled to pay an increased rate of insurance, and the bill prayed, that the defendant might be restrained by injunction from using or suffering the said furnace to be used, for boiling soap, or any other purpose, and also from permitting or suffering the party wall to be or remain in any other state or condition, than the same was in prior to the erection of the aforesaid furnace; and that an account might be taken of all the sums of money paid by the plaintiffs on account of the insurance of the premises, or the goods therein, beyond the rate of insurance paid by them before the erection of the furnace; and that the defendant might be decreed to pay to the plaintiffs respectively, what should be found to have been paid by them in respect thereof.

The injunction, which was moved for upon affidavits, was refused; and after the motion, before any answer was put in, the plaintiff Roger Adamson died.

*A motion was then made before the Vice-Chancellor, [*259]
on the part of the defendant, that the surviving

(a) 1 Sim. and Stu. 249.

1823.—*Ommanney v. Butcher.*

plaintiffs might be ordered, within three weeks, to file a bill of revivor, for the purpose of bringing the representatives of the deceased plaintiff before the court, or in default thereof, that the bill might be dismissed with costs.

This motion having been refused with costs by the Vice-Chancellor, was now repeated before the Lord Chancellor.

Mr. *Hart* and Mr. *Pemberton* for the motion, relied upon the fact, that the death of the co-plaintiff precluded the defendant from putting in an answer; and insisted that the surviving plaintiffs were bound, either to place the defendant in a condition to try the merits of the cause, or to put him out of court.

Mr. *Shadwell* and Mr. *Koe*, against the motion.

The LORD CHANCELLOR did not recollect any instance of a similar motion, but thought that the plaintiffs must submit to have the bill dismissed, or must undertake to revive.

The plaintiffs afterwards elected to dismiss their bill.

[*260]

*OMMANNEY v. BUTCHER.

ROLLS.—1823: 21st and 22d July.

Testator, after bequeathing to A. and B. legacies of stock unequal in amount, and giving several legacies to public charities, requests the said A. and B. to be his executors, and gives to them as such 100 guineas each. He then orders his books, jewels, plate and household furniture to be sold, and after desiring mourning to be provided for his servants, and 5 guineas each to be given to several persons named in the will, and to his two executors for a ring as a token of remembrance, concludes his will in the following manner, "In case there is any money remaining I should wish it to be given in private charity."

Held, that the general residue of the testator's personal estate, consisting of a leasehold estate, money in the funds, and a balance in cash, was not comprehended in the residuary clause, which was confined to the residue of the produce of the articles which the testator directed to be sold.

 1823.—*Ommanney v. Butcher*.

That private charity was an object too indefinite to give the crown jurisdiction, or to enable the court to execute the trust.

That the executors having, as executors, equal legacies, could not take beneficially, and that the next of kin were therefore entitled to the general residue of the testator's personal estate, including what was comprehended in the residuary clause.

Where there is a general indefinite charitable purpose, not fixing itself upon any particular object, the disposition is in the king by the sign manual, but when the gift is to trustees, with general or some objects pointed out, the court will take upon itself the execution of the trust. A trust to be carried into execution by the court, must be of such a nature that it can be under the control of the court.

If a testator means to create a trust, and the trust be ineffectually created or fails, the next of kin take.

If a particular object, as the erection of a school, or even a general object, provided it can be seen what the purpose is, is pointed out, the court will execute the trust, although the object pointed out may fail.

Cases in which the court has interfered upon the ground of trust, distinguished from those in which a direct charity has been pointed out.

BUCKERIDGE BALL ACWORTH, by his will, which was in his own hand-writing, and the commencement of which was in the following form: "I, Buckeridge Ball Acworth, this — day of May, 1818, considering in what manner I should have my fortune disposed of in case of my death, do make this my will," bequeathed to several persons considerable legacies of stock, and amongst others to the plaintiff Sir Francis Molyneux Ommanney 800*l.* bank stock for his life, and after his death, to be divided amongst his children, and 600*l.* 3 per cent. stock at his own disposal; and to Andrew Edge and his wife the interest of 600*l.* 4 per cent. stock for their lives, and after their deaths, to be divided amongst their children; the testator then gave the following legacies to the undermentioned charities, of which he was a governor or trustee; to St. Margaret's Hospital 600*l.* 4 per cent. stock, to the Deaf and Dumb Charity 300*l.* 4 per cent. stock, to the Grey Coat Hospital 400*l.* 4 per cent. stock, to the Blue Coat School 600*l.* 4 per cent. stock, to the Westminster New Charity School 400*l.* 4 per cent. stock, to the Western Dispensary 400*l.* 4 per cent. stock, to the Westminster Hospital 300*l.* 3 per cent. stock, to the Society for Propagating *the Gos- [*261] pel in foreign parts 100*l.* bank stock, to the Society for

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Promoting Christian Knowledge 50 guineas, to the British and Foreign Bible Society 50 guineas, to the Magdalen Hospital 200*l.*; and after disposing of some books and other specific articles, he concluded his will in the following manner; I request my cousin the said Francis Molyneux Ommanney, and my friend the said Andrew Edge, to be the executors of this my will, and give them as such 100 guineas each. I would have my books, except those bequeathed, sold; also I would have my jewels, plate and household furniture sold; I desire that my clothes and linen may be divided between my servants, and that they may have handsome mourning given to them; I desire to be given to Mr. Ellis, Mr. George Ellis, Mr. Bates and Mr. Sutherland, and to my two executors, 5 guineas each, for a ring, as a token of remembrance; in case there is any money remaining, I should wish it to be given in private charity.

B. B. ACWORTH.

The testator died in the month of August, 1818, and the bill was filed by the executors, against the next of kin and the Attorney-General, praying that the respective rights and interests of the plaintiffs and defendants in the residue of the personal estate of the testator, might be ascertained and determined by the decree of the court.

By the decree made upon the hearing of the cause, it was referred to the Master to take the usual accounts of the testator's personal estate, and it was ordered, that the Master should ascertain the clear residue of the testator's estate, and state of what the same consisted.

The Master, by his report, found that the clear residue of the testator's personal estate consisted amongst other things, of a leasehold estate at Chatham, of the several sums of 525*l.* bank stock, 750*l.* 4 per cent. consols, 4,500*l.* 3 per cent. consols, 3,600*l.* new South Sea annuities, *1,000*l.* new South Sea 3 per cent. annuities of the year 1751, of a balance in cash, and of other sums which had arisen from the dividends of the above-mentioned stocks.

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The cause now came on for further directions.

Sir *G. Wilson* and Mr. *Newland* for the plaintiffs:—The testator in this case has enumerated several public charities as the objects of his bounty, and then he has introduced the words *private charity*; his intention was to draw a distinction between public charity and private benevolence, and to confine the disposition in the latter part of his will to purposes of private benevolence; that intention cannot be carried into effect by the court or by the crown; a trust for charitable purposes cannot be executed, unless there is a general disposition to charity, or a specification of such objects as are within the meaning of the statute, (a) *Morice v. The Bishop of Durham*. (b) The expressions used by the testator are so indefinite as to afford evidence that no trust was intended, and the executors are therefore entitled to the residue for their own use and benefit; if they are not entitled beneficially, the trust at all events is of such a nature that the crown cannot interfere with it, and it must be executed by the executors as they think proper.

Mr. *Wingfield*, Mr. *Syden*, Mr. *Roupell*, Mr. *Moore* and Mr. *Polson* for the next of kin:—It is quite clear that the executors are not entitled beneficially; equal legacies are given to them in their character of executors, and it was obviously the intention of the testator to create a trust. There are two points; first, to what does the residuary clause refer; secondly, what is the meaning of the gift. The clause was *intended to [*263] include only the residue of the moneys arising from the sale of the plate, books and furniture, the testator speaks of the sum as contingent; it is impossible he could be adverting to the general residue of his property, which was invested in the funds, and of which he must have known the amount. Several authorities have decided, that the court will look at the whole of a will for the purpose of ascertaining whether it was the intention of the testator to dispose of the general residue or not; *Davers v.*

(a) 43 Eliz. c. 4.

(b) 10 Ves. 522.

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Dewes, (a) *Attorney-General v. Johnstone*, (b) *Page v. Leapingwell*, (c) It is manifest upon the face of this will that it is an unfinished instrument; the expression used by the testator is, "in case there shall be any money remaining;" it is only in the preceding clause that he has directed the conversion of certain articles into money; there is no direction that all the property shall be so converted. The court is driven to one of these two constructions, either that the money remaining means only the residue of the money arising from the sale directed in the preceding clause, or that a general gift of any money which might belong to the testator was intended; and taking the latter view of the case, it is quite clear that stock will not pass under a gift of money. *Hotham v. Sutton*, (d) With respect to the meaning of the words used by the testator, the context of the will shows, that private charity was intended to designate something distinct from the objects pointed at by the testator in the early part of his will, namely, charities of a public nature; private charity is synonymous with benevolence; and it is impossible, therefore, to distinguish this case from *Morice v. The Bishop of Durham*, (e) and *James v. Allen*, (g) There is no authority that a trust for private charity can be carried into execution. In *Waldo v. Caley*, (h) [*264] which *was a mixed case, the bequest being for the promotion of charitable purposes as well of a public as of a private nature, the trust was supported in respect of the reference to public charity. It is not because the word "charity" is used, that there is a sufficient designation of the subject matter to authorize the court to devote the fund to charitable purposes. *Vezey v. Jameson*, (i) *Morice v. The Bishop of Durham* is an authority, that if the court cannot execute the trust, the executors are trustees for the next of kin.

Mr. *Shadwell* and Mr. *Mitford* for the crown :—The questions in this case are, whether there is any gift to charity at all; what

(a) 3 P. Williams 40.

(b) Ambl. 577.

(c) 18 Ves. 463.

(d) 15 Ves. 319

(e) *Ubi. sup.*

(g) 3 Meriv. 17.

(h) 16 Ves. 206.

(i) 1 Sim. and Stu. 69

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is the extent of the gift; and whether the distribution of the fund is to vest in the crown, or forms a trust to be administered by the court; the legacies given by the testator to charitable institutions afford a construction to the words *private charity*; the intention of the testator was, that the residue of his property should be applied to private charities, in opposition to those, which in the early part of his will are made the objects of his bounty, namely, charities administered by means of public institutions; charities of a nature strictly private have been carried into execution by the decree of the court; in *Goffe v. Webb*(a) and *White v. White*(b) bequests for the benefit of poor relations were sustained as charities. The question in these cases is, not whether there are existing objects of charity pointed out specifically, but whether the objects pointed out are of such a nature, that if they do exist, the charity may be exercised towards them. In *Waldo v. Caley* it was as much the intention of the testator to benefit those who were capable of receiving as objects of private charity, as those who were objects of public charity. If there are charitable purposes expressed, the circumstance that the objects are *of a private nature is not sufficient to authorize [*265] the court to declare that the trust shall not be carried into execution. *Morice v. The Bishop of Durham* and *James v. Allen* were determined upon the ground that benevolence did not mean charity at all. In *Vezey v. Jameson* there was no trust which the court could execute; the executors had power to apply the money in such manner and form as they should think fit. It does not necessarily follow that where a testator has directed money to be given in charity, he intends that it shall be distributed by means of public institutions. If the court can uphold this disposition as a gift to charity, the question arises whether the words of the residuary bequest are to be considered as pointing out the residue of the particular fund, or the general residue of the personal estate. Cases of this description must be decided by the words of the particular will. The words "money remaining" do not particularly refer to the money to arise from

(a) Duke, *Charitable Uses*, 8vo edition, 361.

(b) 7 Ves. 423.

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the sale of the books and plate; where a man has disposed of part of his personal estate, and uses the expression "money remaining" he must, generally speaking, be understood to refer to the general residue of his property. In *Legge v. Asgill*,^(a) [*266] where the testatrix expressed herself thus: **"If there is money left unemployed, I desire it may be given in*

(a) 1822: 19th December; 1823. 8th July.

Testatrix, by her will, disposes of certain long annuities, and of a sum in cash, and then uses the following words: "I believe there will be sufficient money left to pay my funeral expenses."

By a codicil to her will the testatrix expresses herself thus: "If there is money left unemployed I desire it may be given in charity."

Held, that the general residue of the testatrix's personal estate, including a sum of 2,500*l.* trust moneys, in which she had a vested reversionary interest, at the time of her death, subject to be divested by the appointment of her mother, passed under the words "money left unemployed," and was well given to charity.

By the settlement made upon the marriage of the late Sir Charles and Lady Asgill, dated the 11th of December, 1755, the said Sir Charles Asgill covenanted, that in the event of the said Lady Asgill surviving him, and there being issue of the marriage living at the time of his decease, his executors should pay to trustees the sum of 10,000*l.*, upon trust to pay the interest to Lady Asgill for life, and after her decease, in the event, which happened, of there being two or more children of the marriage, upon trust to pay the said sum of 10,000*l.* to such one or more of the said children, and in such shares and proportions, as the said Sir Charles Asgill during his life, or the said Lady Asgill after his decease, should by deed or will appoint, and in default of appointment to all the children equally.

There was issue of the marriage between the said Sir Charles and Lady Asgill four children, the present Sir Charles Asgill, Caroline, who intermarried with Richard Legge, Amelia, who intermarried with Robert Colville, and Harriott Maria Asgill, and in the year 1788 the said Sir Charles Asgill died, having, by his will, appointed the said Lady Asgill to be his executrix, and leaving her and his said four children him surviving.

The said Harriott Maria Asgill made her will, dated the 25th of December, 1788, whereby, after appointing the said Amelia Colville to be her executrix, and dividing a sum of 200*l.* long annuities to which she was entitled amongst several persons in specific legacies, she proceeded in the following words: "I give Amelia Colville 2,935*l.*, lent to her husband Robert Colville, 100*l.* of which I desire her to give back to the person that lent it to me and who she knows; I give it to her for her sole and separate use, desiring at her decease she will leave it to whom she thinks best. I believe there will be sufficient money left to pay my funeral expenses, which I desire may be performed in the plainest and most unexpensive manner. I hope there will be no objections made to any mistake I may have made, but that it will

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charity," it was held that the words "money left unemployed" were sufficient to pass the residue of the personal estate, amounting to upwards of 2,000*l.* Presuming that there is in the present case a gift to charity, there being no discretion vested in individuals, and no specific *objects pointed [*267] out, the right of distribution falls to the crown. *Moggridge v. Thackwell.*(a)

be executed as seems to be my intention, as it is my true will and testament, written all in my own hand and signed by me, Harriott Maria Asgill.

The said testatrix afterwards made a codicil to her said will, which was in the following words: If there is money left unemployed I desire it may be given in charity; my watch and pianoforte I give to Caroline, the most useful of my clothes to be given to my present servant; I leave the key of my red trunk, which Caroline knows, to her, Caroline; the contents she knows, and I give it to her as promised for her use, desiring her to keep it locked. Harriott Maria Asgill.

The said testatrix, Harriott Maria Asgill, afterwards died, leaving the said Lady Asgill, Sir Charles Asgill, Amelia Colville, and Caroline Legge, her next of kin; and the will and codicil of the said testatrix were afterwards duly proved by the said Amelia Colville.

Lady Asgill survived the testatrix, but died in the year 1816, and by her will appointed the said Sir Charles Asgill and Amelia Colville to be her executors. The power of appointment contained in the settlement was not exercised either by Sir Charles or Lady Asgill.

The bill, which was filed by the said Richard Legge and Caroline his wife, against the said Sir Charles Asgill and Amelia Colville, and against the Attorney-General, after alleging (as was admitted to be the fact by the answers) that the residue of the personal estate of the testatrix Harriott Maria Asgill consisted of the one-fourth part of the said sum of 10,000*l.* trust moneys, to which she was entitled under the settlement, and of some other effects which were of very trifling value, insisted, that the said residue, upon the death of the testatrix, became divisible amongst the next of kin, not having been disposed of by her will; but stated, that the same was claimed by the Attorney-General, as having been given by the will and codicil of the testatrix to charitable purposes.

By the decree made upon the hearing of the cause before the Vice-Chancellor, on the 27th of February, 1818, the usual accounts were directed of the personal estate of the testatrix Harriott Maria Asgill, and it was declared, that the clear residue of such personal estate ought to be disposed of in charity.

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The MASTER OF THE ROLLS, after observing that it was impossible to suppose the testator could have been ignorant of the nature and amount of the property he [*268] had to dispose of, and that it was evident, not only from the first sentence in which a blank was left for the date, but from other parts of the will, that the testator considered it as an imperfect instrument, proceeded to comment upon the will, and

The plaintiffs having appealed from the decree of the Vice-Chancellor, the question for the consideration of the court upon the argument of the appeal was, whether the general residue of the testatrix's personal estate, and as part thereof the one-fourth part of the said sum of 10,000*l.* which at the time of the death of the testatrix was vested in her under the aforesaid settlement, subject to be divested by the appointment of her mother, must be held to have passed under the words "money left unemployed."

Mr. Trower and Mr. Joseph Martin for the plaintiffs.

Mr. Hart for the defendants in the same interest.

The Attorney-General for the Crown.

THE LORD CHANCELLOR:—I am obliged to attribute to this testatrix an intention which I am sure she never entertained; the law compels me to put such a construction upon this will, as will have the effect of giving this fund to charity. This testatrix, I am bound to suppose, knew what her property was, and I must take her, therefore, to have known that she had a vested interest in 2,500*l.* trust moneys, subject to be divested by the appointment of her mother. Having by her will first disposed of certain long annuities, to which she was entitled, in specific legacies, she uses the following words; "I believe there will be sufficient money left to pay my funeral expenses." It is obvious she meant to apply the word *money* to everything which was not included in what was before given. It is clear that she had other property besides that which she had specifically disposed of not in moneys numbered; several articles are mentioned in the codicil which could not fall under the word *money* in its ordinary sense; it would be extremely difficult for a judge to say, that those other articles, not being money, were not to answer the funeral expenses, so as to give the specific legatees that benefit which they are by law entitled to, namely, to have their legacies paid to them without abatement. If the testatrix meant in this clause of her will to include any part of her property which did not fall under the word *money*, can it be said that she did not mean to include her interest under the settlement? The nature of the property makes it more probable that she did mean to include it. In the codicil the testatrix expresses herself, thus, "If there is money left unemployed, I desire it may be given in charity." In the ordinary sense of the words she might be said to contemplate a hand-

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remarked that the expression, "I request my cousin and my friend to be my executors," was easily *under- [269] stood, if it was meant that they should undertake a troublesome duty, but was not likely to have been made use of, if the testator intended to constitute them his residuary legatees; and that although in the early parts of the will the executors were not the objects of equal favor; yet that equal legacies were given to them wherever they were taken up altogether as executors. His Honor then proceeded in the following manner:

The first question to be considered is whether the executors are entitled to the general residue of the testator's estate. Let us suppose that the last clause of this will, upon which the material questions have arisen, had been altogether omitted, to whom would the testator's undisposed of property have gone; can there be a doubt that the executors would have been trustees for the next of kin. There never has been a case in which executors have been permitted to take the residue for their own use and benefit, when equal legacies have been given to them, and given to them as executors. Their having equal legacies marks them as being intended to discharge laborious duties, and not to take for their own use and benefit what may be left as residue. If the last clause of this will had been omitted, I am clearly of opinion that the executors would have been trustees for the next of kin; then the question is whether, as

ful of casual money: but that is not a construction I can put, consistently with the construction which I am compelled to put, upon the words of the will. The case which has been cited from *Ambler*,^(a) applies in some sense to this. There Lord Camden decided that the residue did not under the particular circumstances take in lapsed legacies; he made that decision because he did not consider the legatee as a general residuary legatee, and the question therefore was, what was the meaning of the words of the gift. In this case, the question is, whether under the words, *money left unemployed*, the testatrix meant to pass the general residue of her estate and effects; the words *money left* in the first passage clearly mean everything which is left after the prior gifts,—and how can I restrain the meaning of the same words in the codicil? Upon the whole, therefore, I am afraid that this sum is well given to charity.

Decree affirmed.

(a) *Attorney-General v. Johnstone*, Amb. 577.

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[*270] to this point, the last clause makes any *difference; whatever construction may be put upon that clause, whether it embraces the whole or only a small portion of the residue, there is nothing in it which at all alters the character or situation of the executors, or gives any interest to them. Their claim, therefore, to have the residue for their own use and benefit cannot be sustained, and the question rests entirely between the next of kin and the crown.

The law upon cases of this sort is now reduced to very clear and distinct principles. Where there is a general indefinite charitable purpose, not fixing itself upon any particular object, the disposition is in the king by the sign manual; but where the gift is to trustees, with general or some objects pointed out, the court will take upon itself the execution of the trust.^(a) Then what is the nature of this case; is it a case in which the objects are pointed out; is it a case in which a discretionary power is vested in selected individuals to execute a purpose expressed by the testator? Can the trust be discovered from the expression, "I desire it to be given in private charity?" because a trust, to be carried into execution by the court, must be of such a nature that it can be under the control of the court; ^(b) if the trust cannot be ascertained, the court cannot see to the execution of it; it becomes too general and indefinite, and the consequence is, that the fund must either go as an absolute gift to the individual selected to distribute it, or that individual must be a trustee for the next of kin; if the testator meant to create a trust, and the trust is not effectually created, or fails, the next of kin must take; and, on the other hand, if the party selected to make the distribution is to take, it must be upon the ground that the testator did not intend to create a trust, but to leave it entirely to the discretion *of the party to apply the fund or not. The points to be considered in these cases are whether the object is definite; whether the person is described by whom the distribution is to be made, and whether that indi-

(a) *Moggridge v. Thackwell*, 7 Ves. 36.

(b) *Morice v. The Bishop of Durham*, 10 Ves. 439.

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vidual is, as in *Moggridge v. Thackwell*, a mere instrument to carry into execution the objects stated, or is to take the fund for his own benefit. If he is not to take for his own benefit, the consequence is, that if a particular object, as the erection of a school, or even a general object, provided it can be seen what the purpose is, is pointed out, the court will execute the trust, although that object may fail, because then it has something to act upon; but if there is an absence of discretion in individuals, and the object to which the fund is to be applied is of a general indefinite nature, the law casts the application of the fund upon the king as *parens patriæ*.

It is material upon this subject to consider that in those cases where there is no direct charity pointed out, there may be a legal purpose of trust created to be carried into execution, not a superstitious use, not an illegal use. It is competent to a testator to direct his executors to give to his poor relations; that is not a charity, but it is a trust to give to poor relations. So with respect to provisions for the distribution of books; if the object is not illegal, why is not the court to see that the intention is carried into execution; all those cases, not being cases of charity, in which the court has interfered, only prove that the court will execute a trust which is not illegal.

The cases which most nearly resemble the present are those in which there is a general description, such as in *Morice v. The Bishop of Durham*; the bequest there was in trust for such objects of benevolence and liberality as the Bishop of Durham in his own discretion, should most approve; an individual was there designated trustee; the question was, not whether the trust was illegal, but *whether it was sufficiently [*272] definite for the court to execute. Liberality and benevolence include charity, but they are not convertible terms. The case, therefore, not ranking under those which belong to charity, the question came to be considered, whether the purpose was sufficiently definite for the court to execute. The court held that it was not. The fund, therefore, belonged to the next of

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kin. It did not belong to the crown because it was not charity, it did not belong to the court because it was not sufficiently definite for the court to execute, and a trust having been created it devolved to the next of kin. That was the principle laid down in *Morice v. The Bishop of Durham*. In all cases falling within that principle, where there is a generality which the court cannot execute, and a trust imposed upon the individual who is selected to distribute, the trust fails, and the fund is held by the trustee for those persons to whom the law has given personal property which is not disposed of.

Two questions arise upon the last clause of the will of this testator; First, what is meant to be included in it; Second, in what manner is the property included to be disposed of. The language of the clause in question, is such as applies to a small sum only, small in regard to the property of the individual. It is spoken of as contingent, a circumstance which, if any other meaning can be put upon the clause, excludes the idea that the testator had in contemplation the general parts of his property of which he had made no disposition. Again, the words of the will are, if there be any *money* remaining. *Hotham v. Sutton* has established that *money* does not, by the force of the word, include *stock*. If then reason and the nature of the context negative the probability that the testator was adverting to the stock—why is the court to put a construction upon the word *money* which it does not naturally import? It is remarkable that up to a certain extent all the dispositions in this will are [*273] legacies of stock; the *testator, therefore, has distinguished where he meant stock to be the subject of his disposition, and the context shows that in the clause in question he was not adverting to the stock. To construe the word *money* to mean *stock* would be to alter the words of the will contrary to the context. I own there is difficulty in knowing what the testator meant, but in cases of this sort we must do our best to put the most natural construction upon the words. My opinion is, that the testator was adverting to that which he has directed to be converted into money, and that the clause in question does

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not comprehend the general residue, but must be considered as applying to the residue of the produce of those articles which the testator has directed to be sold, after providing for the payments which are ordered to be made. Supposing that to be the case, it remains to be considered whether the crown is to distribute this sum, or whether it belongs to the next of kin. The amount is small, but the principle is considerable. It appears to me that this case falls within the principle of the cases cited, in which there is no object sufficiently definite to give the crown jurisdiction, or to enable the court to execute the trust. There is no case in which private charity has been made the subject of disposal in the crown, or been acted upon by this court. The charities recognized by this court are public in their nature, they are such as the court can see the execution of. In this case the difference is obvious; if a party is to execute the purpose of this testator he cannot give to public charities; the disposition must be confined to private charity. In what respect does private charity differ from benevolence? Assisting individuals in distress is private charity, but how can such a charity be executed by the court or by the crown. In all cases the general principle is, that the trust must be of such a tangible nature as that the court can deal with it; when it is mixed up with general moral duty it is not the subject of the jurisdiction of a court of justice. Private charity is in its nature indefinite—how can it be controlled, how can it be carried *into execution. [*274] As a general purpose of charity, the object of this testator cannot be carried into execution, as a trust it is not sufficiently specific or definite. The sum in question must therefore go to the next of kin. With respect to the case of *Legge v. Asgill*, the testatrix in that case in the body of her will says, "I believe there will be sufficient money left to pay my funeral expenses;" and in the codicil she uses the expression, "If there is money left unemployed I desire it may be given in charity." In the will, the word "money" must have referred to the general residue, because it was out of the general residue that the funeral expenses must be paid; and it could not be doubted but that the same word in the codicil must have reference to the same subject.

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The decree declares, that the plaintiffs, the executors, are trustees for the next of kin, as well of the remainder of the money arising or to arise from the sale of the specific articles and things directed to be sold by the will of the said testator, Buckeridge Ball Acworth, as of the general residue of the testator's personal estate.

WILLIAM MOUNTFORD v. ROBERT SCOTT, JAMES BLAKE, AND
CHARLES WARNER.

1823: 23d July.

Where deeds are deposited for the purpose of obtaining credit, the person with whom they are deposited has no lien upon them for what is due to him in respect of moneys previously advanced.

Whether notice to an attorney in one transaction shall be notice to him in another transaction, must in all cases depend upon the circumstances.

By indenture of lease, dated the 3d of March, 1809, a piece of ground was demised by William Stapp to the defendant, Robert Scott, for the term of 78 years and a quarter from the 25th of March then instant, at the yearly rent of 18*l.* 2*s.*, and on the 18th of April, 1809, the lease was placed by Scott in the [*275] hands of the plaintiff, to *whom he was at that time indebted; at the time of the deposit of the lease one house had been erected upon the ground demised, and four others were afterwards built, and an underlease of those four houses was, by indenture, dated the 16th of February, 1810, granted by the defendant Scott to the defendant Blake for the term of 77 years and a half, wanting ten days, from the 25th of December then last, at a peppercorn rent. The underlease was expressed to be made in consideration of 200*l.* paid by Blake to Scott; but it was in fact made in part satisfaction of a debt due from Scott to Blake for timber and materials used in building the houses. It contained a covenant on the part of Scott to indemnify Blake against the rent of 18*l.* 2*s.* reserved by the original lease, and a power was given to Blake to enter and distrain upon the remainder of the premises comprised in such original lease

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in case he should be called upon to pay such rent, and Scott covenanted that in the event of there not being sufficient distress upon the premises, he would assign over the original lease to Blake. The defendant Blake afterwards sold the four horses to the defendant Warner for 285*l*, and assigned them to him by a deed poll indorsed on the underlease, and dated the 28th of March, 1810. The underlease and the deed poll were prepared by the same solicitor.

The bill stated the foregoing facts and alleged, that the original lease was deposited with the plaintiff as a security for the debt then due to him, and that the defendant Blake, at the time of the underlease being granted, and the defendant Warner, at the time of the assignment to him, respectively had notice of the deposit having been made for the above-mentioned purpose. The bill prayed that an account might be taken of what was due to the plaintiff on the security of the lease of the 3d of March, 1809, and that the defendants might be decreed to pay to the plaintiff what upon taking such account should appear to be due to him, or in default of payment, that *the de- [*276] fendants might be decreed to assign and convey to the plaintiff all their estate and interest in the lease deposited with the plaintiff, and also in the lease of February, 1810, and that such of the defendants as should appear to have the lease of February, 1810, and the deed poll indorsed thereon, in their possession or power, might be decreed to deliver up the same to the plaintiff; and if it should appear that Warner had not, before the execution of the assignment to him, and the payment of the purchase money for the same, any notice or reason to believe that the lease of the 3d March, 1809, had been deposited with the plaintiff, then that the defendants Scott and Blake, or one of them, might be decreed to pay to the plaintiff, what should appear to be due to him for principal and interest, on the security of the said lease.

By the joint several answer of the defendants Scott and Blake, the defendant Blake admitted, that before the underlease was

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granted to him, he had been informed of the original lease having been deposited with the plaintiff as a security for a sum of money due to him from the defendant Scott, but insisted that such lease, so deposited, could be considered only as affecting the one house which was erected on the piece of ground in question at the time of the deposit of such lease with the plaintiff, if the deposit could be considered as having effect at all.

The defendant Warner, in a passage of his answer which was read as evidence, admitted that Gyles, the solicitor who prepared the underlease, was his solicitor at the date of the assignment to him, and was employed by him to prepare, and did prepare the deed poll of the 28th of March, 1810, and perused and approved of the same on his behalf, and as his solicitor, but he denied, that at the time of the execution of the deed poll, or of paying his purchase money for the underlease, he had any notice of the original lease having been deposited with the [*277] *plaintiff for the purpose of securing the payment of any sum of money, or for any other purpose.

Gyles, the solicitor who prepared the underlease and assignment, was examined both on the part of the plaintiff, and of the defendants, and deposed, that upon the occasion of his being instructed to prepare the underlease, he asked the defendant Scott for the original lease, and that the defendant Scott informed him, that he had left it in the hands of the plaintiff for the purpose of obtaining credit thereon, and that the plaintiff, after it had been so left with him, had viewed the premises thereby demised, and had declared, that the messuage erected thereon was not, in the shape of security, worth one shilling, the same being subject to a yearly ground rent of 18*l.* 2*s.*, and that he would not give him the defendant Scott any credit whatever upon the said lease, or the premises thereby demised. Gyles further deposed, that the defendant Scott at the same time declared to him, that he never had any timber or other goods or articles whatever from the plaintiff, by way of credit or otherwise, after he had left the said lease with him, and that he had not at any time given or

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executed any instrument to the plaintiff for any debt due or owing by him to the plaintiff, whereby the said lease was declared or understood to be deposited with the plaintiff as or by way of security, and that he had not ever given any security whatever to the plaintiff for the debt due from him, save and except a promissory note or bill of exchange for the sum of 130*l.*, or thereabout, for goods sold and delivered some time previous to the time of his leaving the lease with the plaintiff, and that the occasion of his having left the said lease with the plaintiff was, in consequence of his having some time after he had given the aforesaid promissory note or bill of exchange, applied to the plaintiff for some timber on credit, to carry on and complete some buildings, and the plaintiff having requested to know whether he would *deposit any lease or deed as a security [*278] for such further credit. Gyles further deposed, that he prepared the underlease of the 16th of February, 1810, as the solicitor of the defendants Scott and Blake, and that he was before, and at the time of the date or execution of the said indenture of underlease, informed by the defendant Scott, that the original lease was then deposited with the plaintiff. The defendant Scott was also examined by the plaintiff.

After several witnesses had been examined, the defendant Blake became bankrupt, and the defendant Scott took the benefit of the Insolvent Debtor's Act, and a supplemental bill was filed against their assignees.

The cause was heard before the Vice-Chancellor on the 24th of January, 1818, and his Honor ordered the bill to be dismissed.(a)

The plaintiff appealed from the decree of the Vice-Chancellor, and the appeal now came on.

In the course of the argument an objection was made by the defendants to the evidence of Scott being read for the plaintiffs, upon the ground that a decree was prayed against him. In an-

(a) 3 Madd. Rep. 34.

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swer to the objection, it was argued that Scott, having taken the benefit of the Insolvent Debtor's Act, his provisional assignee would alone be liable.

The LORD CHANCELLOR observed, that in the lease to Blake, Scott covenanted, in the event of there not being a sufficient distress upon the premises, to assign over the original lease; that Warner as the assignee of Blake would be entitled to the benefit of that covenant; and that Scott, therefore, was interested, because there might be a demand upon the covenant, [*279] on which he might be *sued, and to which, if he was sued (the demand being after the proceedings under the Insolvent Debtor's Act), both his person and estate would be liable.

Mr. *Agar* and Mr. *Parker* for the appellant:—It is quite clear that the equitable title of the plaintiff must prevail against the legal estate of the defendant, if he is affected with notice; *Hiern v. Mill*,(a) The possession of the original lease by the plaintiff was sufficient to put the defendant upon inquiry, and therefore to affect him with notice. *Smith v. Low*,(b) Where a purchaser cannot make out his title except through a deed which leads to a fact, he is to be considered as having knowledge of that fact. *Mertins v. Jolliffe*,(c) It has been often decided that notice to an agent is notice to the principal. *Maddox v. Maddox*,(d) *Le Neve v. Le Neve*,(e) *Sheldon v. Cox*,(g) In this case Gyles had notice of the deposit with the plaintiff, and it is admitted that he was the solicitor of Warner.

Mr. *Hart* and Mr. *Willis* for the defendants.

THE LORD CHANCELLOR:—I am clearly of opinion that there is in this case no ground for determining that the plaintiff is entitled to relief. It is true that it is established that a deposit of

(a) 13 Ves. 114.

(b) 1 Atk. 489.

(c) Ambler, 311.

(d) 1 Ves. Sen. 61.

(e) Ambl. 436.

(g) Ambl. 624.

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deeds is to be taken as a fact of evidence that the deposit is made for the purpose of securing money; that was laid down by Lord Thurlow, upon the notion that the deposit could be made for no other purpose; but the whole tenor of all the cases is, that that doctrine is not to be carried further. The Vice-Chancellor in this case appears to have proceeded *upon the [*280] notion, that notice to a man in one transaction is not to be taken as notice to him in another transaction; in that view of the case it might fall to be considered, whether one transaction might not follow so close upon the other, as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening; it must in all cases depend upon the circumstances. Supposing that when Warner took this assignment, he was affected with notice of what was known to Gyles in the transaction with Blake, it is a clear fact in proof in this cause that the lease was not deposited for money advanced at the time; if it was put into the hands of the plaintiff as a security at all, it must have been for an antecedent debt; but the account which Gyles gives of the transaction is, that the lease was carried to the plaintiff, not for the purpose of being applied as a security for money already advanced, but for the purpose of obtaining future credit; I apprehend it has never been held, that if deeds are carried to a man for the purpose of obtaining credit from him, he has a lien upon them for what is due to him in respect of moneys theretofore advanced. Such a decision would carry the doctrine upon mortgages by deposit of deeds, further than it has ever yet been carried. This decree therefore must be affirmed.

Decree affirmed.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY,
COMMENCING IN THE
SITTINGS BEFORE MICHAELMAS TERM,
3 GEO. IV., 1822.

*ROBERT JOHNSON AND OTHERS, ON BEHALF OF THE [*281]
CREDITORS OF SIR JOHN LEGARD *v.* SIR THOMAS
LEGARD, BART., THOMAS DIGBY LEGARD, HENRY WIL-
LOUGHBY, DIGBY LEGARD, AND RICHARD WATT.

1822: 10th, 12th, 21st and 23d July.

The creditors of a vendor cannot insist that an estate contracted to be sold has been converted into personal assets, unless the title be such, that the court will compel a purchaser to take it.

The author of a voluntary settlement cannot file a bill for the specific performance of a contract afterwards entered into by him to sell the settled estate.

Whether his creditors after his death can maintain such a bill. *Quere.*

The court was of opinion, that limitations in a marriage settlement to the brothers of the settlor and their issue were voluntary; but thought, under the circumstances, that a purchaser could not be compelled to take the title depending on the validity of those limitations, and dismissed a bill by the creditors of the vendor after his death for specific performance, there having been subsequent dealings with the estate which might have confirmed the settlement, the agreement for purchase being suspicious, and it being doubtful whether the creditors could file such a bill.

A voluntary settlement may be made good by matter, *ex post facto*.

By the settlement made upon the marriage of Sir Digby Legard with Jane Cartwright, in the year *1755, [*282]
several estates, and amongst others an estate at Etton

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in the county of York, were conveyed by Sir Digby Legard, to the use of himself for life; remainder to the intent that Jane Cartwright, if she survived him, might during her life receive an annuity of 500*l.* for her jointure; remainder to trustees for the term of two hundred years, to secure the annuity; remainder to other trustees for the term of five hundred years, in trust to raise the sum of 6,000*l.* for the portions of the younger children of the marriage; remainder to the first and other sons of the marriage successively in tail male; with divers remainders over.

There was issue of the marriage between the said Sir Digby Legard and Jane Cartwright, John, afterwards Sir John Legard, Thomas, afterwards Sir Thomas Legard, one of the defendants, the defendant Digby Legard, and several other sons and daughters. Sir Digby Legard died in 1773; and in the month of May, 1782, Sir John Legard suffered a recovery of the settled estates, and declared the uses to himself in fee.

By indentures of lease and release, dated the 14th and 15th of June, 1782, made previous to and in contemplation of a marriage, then intended and afterwards solemnized, between the said Sir John Legard and Catherine Lapel Aston, the release being made between the said Sir John Legard of the first part, Henry Aston and Catherine Lapel Aston of the second part, Thomas Grimston and Edward Dicconson of the third part, Thomas Eccleston and Edward Standish of the fourth part and Henry Harvey Aston and Anthony Hodges of the fifth part, after reciting that the sum of 4,000*l.* was to be received by the said Sir John Legard as the portion of the said Catherine Lapel Aston, the said Sir John Legard, in consideration of the intended marriage, and of such portion as aforesaid, and for making a provision for the *said Catherine Lapel Aston and the issue of the marriage, and for settling the estates thereafter mentioned to the uses thereby declared, conveyed the estates which had been comprised in Sir Digby's marriage settlement, subject to the jointure and to the terms of two hundred years and five hundred years thereby created, to the use of him-

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self for life, remainder to trustees during his life to preserve contingent remainders, remainder to the intent that the said Catherine Lapel Aston should, during her life, receive thereout an annuity of 300*l.* for her jointure, remainder to trustees for the term of one hundred years to secure the annuity, remainder to trustees for the term of five hundred years for raising portions for the younger children of the marriage, remainder to the use of the first and other sons of the marriage successively in tail male, remainder to the use of the first and other sons of Sir John Legard by any future wife successively in tail male, remainder to the use of the defendant Sir Thomas Legard for life, remainder to the use of the first and other sons of the said defendant Sir Thomas Legard successively in tail male, with similar limitations in remainder to the defendant Digby Legard and the other brothers of Sir John Legard for their lives successively, and to their first and other sons successively in tail male, with remainder to Sir John Legard in fee.

In the year 1805, an Act of Parliament was passed, on the petition of Sir John and Lady Catherine Legard, by which, after reciting that the sum of 6,000*l.* raisable under the trusts of Sir Digby's marriage settlement, had been raised by mortgage of the settled estates, and that those estates had been further mortgaged for the purpose of securing several sums of money which Sir John Legard had charged thereon under the powers of several enclosure Acts, and that the enclosures not being yet completed, further sums of money would be wanted for that purpose; and also reciting that by an indenture, dated *the [*284] 21st of March, 1805, Lady Jane Legard had released the estate at Etton from her jointure, being satisfied that the residue of the estates subject thereto were an ample security for the same; several detached parts of the settled estates, including a part of the estate at Etton, were discharged from the uses limited by Sir John Legard's marriage settlement, and vested in trustees, upon trust to sell, and after applying the purchase moneys in paying off the above-mentioned incumbrances on the settled estates, and reimbursing Sir John Legard the expenses of the enclosures not

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then completed, to the extent to which by virtue of the enclosure Acts he was empowered to charge such expenses upon the settled estates, to lay out the surplus in the purchase of other estates to be limited to the uses of the settled estates.

In October, 1807, Sir John Legard entered into a contract to sell the Etton estate to the defendant Richard Watt, for 15,500*l.*; the agreement for sale recited, that Sir John Legard was seised in fee of the estate, subject to the term of five hundred years for raising portions for his younger children, and also subject to a limitation to his first and other sons by Catherine his wife, successively in tail, but discharged of all other incumbrances; and it provided, that Sir John Legard or his heirs should, on or before the 6th of April, 1808, convey the estate to Watt, discharged of the term of five hundred years and the trusts thereof, and indemnified from the said limitation to his issue male. The agreement further provided, that upon the conveyance being made, the purchase money, with interest, should be secured by a mortgage of the estate and by the bond of Watt; and that it should remain upon that security during the life of Sir John Legard, and for twelve months after his decease, if the interest was regularly paid, and should not in any case be called in before the expiration of three years. It was also stipulated by the [*285] agreement, that if Watt, his heirs or *assigns, should be evicted from or deprived of the possession of the premises by any issue male of Sir John Legard, or by any other person claiming or deriving title through or under him, any sums of money laid out by Watt or his heirs in improvements or necessary alterations on the premises, with lawful interest for the same from the time such sums were advanced, and also so much of the purchase money as might have been paid, should be repaid by Sir John Legard, his heirs, executors or administrators; and the security for the purchase money remaining unpaid, was on the same event to cease and be void.

Sir John Legard died without issue in the month of July, 1808, leaving the defendant Sir Thomas Legard his heir at law, and

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having by his will appointed the defendant Digby Legard to be his executor. At the time of his death, the contract for the sale of the Etton estate had not been carried into effect, though he had instituted a suit for specific performance which was then pending. Previous to the death of Sir John Legard a commission of lunacy had issued against Sir Thomas Legard, and the defendant Henry Willoughby was the committee of his estate.

The bill, which was filed by creditors of Sir John Legard, whose debts were contracted subsequently to the date of his marriage settlement, charged, that the limitations contained in that settlement, subsequent to the limitations therein contained to the first and other sons of Sir John Legard by any future wife, were fraudulent and void; and that no consideration had at any time been given, by or on the behalf of any of the objects of the said limitations, in respect of the estates limited to them respectively. The bill further charged, that the defendant Digby Legard refused to take the necessary steps for the purpose of enforcing the contract, and alleging that the *personal [*286] estate of Sir John Legard, exclusive of the purchase money, was insufficient for the payment of his debts, it prayed that it might be declared by the court that the limitations in remainder contained in the indenture of release of the 15th of June, 1782, subsequent to the limitations therein contained to the first and other sons of Sir John Legard by any wife he should afterwards marry in tail male, were, so far as respected the premises contracted to be sold to Watt, fraudulent and void; and that the agreement of October, 1807, might be specifically performed, and a proper conveyance executed to Watt of the premises therein comprised; and that Watt might be directed to pay the purchase money for which the premises were contracted to be sold to the defendant Digby Legard, as part of the personal assets of Sir John Legard; and that the same when received might be applied in a proper course of administration, and the debts due to the plaintiffs and the other creditors of Sir John Legard paid thereout.

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The defendants Sir Thomas Legard and Thomas Digby Legard, by their answers, insisted that the limitations contained in the marriage settlement of Sir John Legard sought to be impeached by the bill, were good and valid; and that the consideration appearing upon the settlement, and the natural love and affection of Sir John Legard for his brothers, were sufficient to support the uses. They also insisted, that the Act of Parliament confirmed the settlement, and that if the settlement could be considered as voluntary, neither Sir John Legard, nor any persons claiming under him, could call upon them to join in a conveyance of the premises.

The defendant Watt, by his answer, objected to the title on account of the settlement, but submitted to perform the agreement on having a good title.

[*287] *The cause was heard at the Rolls on the 17th of December, 1818; and it being then considered necessary to obtain the opinion of a court of law upon the validity of the limitations in the settlement to the brothers of the settlor and their issue, a case was by the decree directed to be made for the opinion of the Court of King's Bench upon that point. A case was accordingly prepared in pursuance of the decree, stating the settlement, and that the estate had been conveyed to Watt for a valuable consideration: but the conveyance was not stated to have been such as would have been made if the terms of the agreement had been strictly pursued, and no notice was taken of the Act of Parliament. The judges of the Court of King's Bench having certified, upon the case before them, that none of the limitations to the brothers of the settlor or their issue were valid against the defendant Watt,^(a) the cause was heard, upon further directions, before his Honor the Vice-Chancellor on the 18th of July, 1818;^(b) and a decree was made, by which it was declared that the limitations in remainder contained in the indenture of the 15th of June, 1782, subsequent to the limitations

(a) 6 *Man. & Selw.* 60.

(b) 3 *Madd.* 283.

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therein contained to the first and other sons of Sir John Legard by any wife he should afterwards marry in tail male, were, so far as they respected the premises contracted to be sold to the defendant Watt, fraudulent and void as against that defendant; and it was referred to the Master to inquire whether a good title could be made to the premises in question.

The defendants, Sir Thomas Legard and Thomas Digby Legard, having presented a petition of appeal, both from the original decree, and the decree on further directions, the cause now came on to be heard upon appeal.

The *Attorney-General*, Mr. *Shadwell* and Mr. *Hayler* for the plaintiffs: *The limitations in the settlement to [*288] the brothers of the settlor and their issue are voluntary, and void against a purchaser for valuable consideration under the statute of *Elizabeth*.(a) In all the cases in which limitations to collateral relations in a marriage settlement have been sustained, there has been some consideration independent of the marriage and the portion of the wife. In *Jenkins v. Keymis*(b) where it is stated to have been the opinion of Hale that the consideration of marriage and portion extended to all the estates in the settlement, the father of the settlor was tenant for life, and the settlement could not have been made without his concurrence; and the opinion expressed by Hale must have referred to the circumstances of the case, for in *Roscarrick v. Barton*(c) he appears to have considered a limitation to a brother in a marriage settlement to be voluntary. In *Osgood v. Strode*,(d) where the court decreed the specific performance of marriage articles at the instance of a nephew of the settlor, the grandfather was considered to have become a purchaser by giving up an equitable interest in the estate. In *Stephens v. Trueman*,(e) *Ithell v. Beane*(g) and *Roe v. Milton*,(h) limitations which would otherwise have

(a) 27 Eliz. c. 4.

(b) 1 Lev. 150.

(c) 1 Ch. Cas. 217.

(d) 2 P. Wms. 245.

(e) 1 Vea. 73.

(g) 1 Vea. 215.

(h) 2 Wils. 356.

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been deemed voluntary, were supported upon similar principles : but it is clear that the marriage consideration alone will not support remainders to collateral relations. Lane 22. *Staplehill v. Bully*, (a) *Sutton v. Chetwynd*, (b) In addition to those authorities, the decision of the Court of King's Bench in the present case is decisive upon that point. The case of *Clayton v. Earl Winton*, (c) has not infringed upon the law, as the limitations to the issue of the second marriage were in that case interposed between the limitations to the sons, and those to the daughters of [*289] the first marriage. *White v. Stringer*, (d) which has been relied on as an authority in support of the limitations in this case, proceeded upon the principle, that the purchaser, by taking a collateral security, had acknowledged the limitations to be good, and could not afterwards take advantage of the statute. It is clearly settled, that a voluntary settlement is void against a purchaser for valuable consideration, though he has notice of it. *Doe v. Manning*, (e) Assuming the limitations to be voluntary, the next question is, whether Watt, having entered into a contract to buy the estate, but not having obtained a conveyance, is a purchaser within the meaning of the statute? The intention of the statute was, that wherever an estate was created for a valuable consideration, the voluntary settlement should be defeated. A court of equity considers that which is contracted to be done for a valuable consideration as actually done; and from the time of the contract, therefore, the purchaser is in equity the owner of the estate, and the voluntary settlement is void against him. In *Metcalfe v. Pulvertoft*, (g) a receiver was appointed before answer, at the instance of a purchaser from the settlor; and in several other cases agreements to purchase, entered into with the settlor, have been carried into effect against those claiming under the settlement. *Leach v. Dean*, (h) *Douglasse v. Waad*, (i) *Parry v. Carwarden*, (k) *Buckle v. Mitchell*, (l)

(a) Prec. Chan. 224.

(b) 3 Meriv. 249.

(c) 3 Madd. 302.

(d) 2 Lev. 105.

(e) 9 East 59.

(g) 2 Vea. and Beam. 180.

(h) Rep. in Chan. 78.

(i) 1 Ch. Cas. 99.

(k) 2 Dick. 544.

(l) 18 Vea. 100.

 1872.—*Johnson v. Legard.*

The remaining question is, whether the creditors have not a right to compel the performance of the contract. At the death of Sir John Legard the estate was in equity converted into personalty; and the executor having an adverse interest, the creditors may file a bill to obtain the benefit of that conversion. In *Smith v. Garland*,^(a) Sir William Grant decided, that the court would not *assist a vendor in defeating a prior voluntary settlement made by himself: there is great inconvenience in that decision, as it has the effect of rendering the contract binding on the vendor and not on the purchaser. This case is distinguishable from *Smith v. Garland*: there the bill was filed by the vendor against an unwilling purchaser, who repudiated the benefit of the statute; this is a suit by creditors, claiming adversely to the vendor, against a willing purchaser. The creditors have a better equity than the vendor: they may have forborne to demand payment of their debts upon the faith of this contract. In many cases the creditors of a party have a superior equity to that of the party himself. When a power is executed in a defective manner, the party executing the power cannot have the assistance of the court to remedy the defect, but his creditors may file a bill for that purpose. [*290]

Mr. *Horne*, Mr. *Sugden*, and Mr. *Lynch*, for the defendants claiming under the settlement:—It is unnecessary to enter into the question of the validity of the settlement at law; but it is an obvious argument in favor of the remainders, that there being a title in the family, it was important to the wife, that those who succeeded to the title, in case the husband died without issue, should have power to support the dignity. The statute of Elizabeth does not apply to purchasers who do not claim under actual conveyances. The language of the statute, connecting purchasers with lessees and grantees, who must claim under a conveyance, shows that the persons intended to be protected were those to whom estates had been actually conveyed. How can the statute, which was intended to prevent frauds being practised upon purchasers, apply to the cases of persons, who have merely contracted

(a) 3 Meriv. 123.

1822.—*Johnson v. Legard.*

for estates, and paid no part of the purchase money? [*291] *If a voluntary settlement is affected by the statute from the date of the contract, its existence will depend upon circumstances varying from day to day. At all events, there must be a *bona fide* contract to defeat the settlement; but the agreement in this case was a mere trick on the part of Sir John Legard, to which the purchaser was a party. No part of the purchase money was to be paid till twelve months after the death of Sir John Legard; and if the purchaser was evicted by the remainder-men, the money was to be repaid; the purchaser, therefore, loses nothing if the voluntary settlement prevails. In this view of the subject, *White v. Stringer* decides the case. There is no case prior to *Buckle v. Mitchell*, in which a purchaser, with notice of a voluntary settlement, ever obtained a decree for specific performance. In the previous cases nothing is said about notice to the purchasers. In *Buckle v. Mitchell* it was not necessary to decide the general principle; the settlement contained a power to sell for the purpose of paying off mortgages existing on the estate, and the settlor had paid off a mortgage with his own money; the legal estate also was outstanding, so that the question was, which party had the better equity? The authority of that case, therefore, does not extend beyond the opinion expressed by Sir W. Grant. This case falls within the distinction mentioned by Lord Hardwicke in *Bennet v. Musgrove*,^(a) and *Oxley v. Lee*,^(b) that in cases of presumed fraud a purchaser for valuable consideration must be left to his remedy at law, and that this court will only relieve against a voluntary conveyance in cases of actual fraud. The Act of Parliament obtained by Sir John Legard was such a recognition of the settlement, as to make it good by matter *ex post facto*. It [*292] is not competent *to the creditors of the settlor to file this bill; they can have no better equity than the settlor himself, by whom the bill could not have been sustained. *Burke v. Dawson*,^(c) *Smith v. Garland*.

^(a) 2 Ves. 51.^(b) 1 Atk. 625.^(c) Rolls, March, 1805. Sug. Vend. and Purch. 5th ed. 569.

1832.—*Johnson v. Legard*.

Mr. *Hart* and Mr. *Wetherell* for the defendant *Watt*.

The *Attorney-General*, in reply, as to the invalidity of the remainders to the collateral relations, relied upon the opinion of the Court of King's Bench, and upon the case of *Sutton v. Chetwynd*, and as to the application of the statute to a purchaser under a contract only, upon the cases cited in the opening. Admitting that a voluntary settlement might be made good by subsequent transactions, he contended that the Act of Parliament in this case had no such effect; that it was competent to Sir John Legard, as against the remainder-men, to have sold without the intervention of Parliament, and that the Act was passed only to enable him to sell as against his mother and his wife and issue; that no consideration, therefore, moved from the remainder-men, and that it was not sufficient to make good their estates that the mother had relinquished her claim on a portion of the property; more particularly as it appeared by the recitals of the Act that there was an ample fund remaining to answer her jointure. With respect to the nature of the agreement, he insisted that there was nothing unreasonable on the part of the purchaser in taking care to protect himself against the acts of persons claiming under Sir John Legard; and that if the estate had been conveyed the conveyance must have contained a covenant for that purpose; and as evidence of the *bona fides* of the transaction, he relied upon the circumstance of Sir John Legard's having *filed a bill to enforce the contract. After citing the [*293] case of *Evelyn v. Templar*(a) as establishing the proposition that the remainder-men had no claim upon the money produced by the sale; he further argued, that there being at the death of Sir John Legard a binding contract between him and Watt, which had converted the real estate into personal, and the executor refusing to file a bill, the court would enforce the contract at the instance of the creditors. *Lacon v. Mertins*(b) *Buckmaster v. Harrop*(c)

(a) 2 B. C. C. 148.

(c) 1 Ves. 341; 11 Ves. 456.

(b) 3 Atk. 1.

1822.—*Johnson v. Legard*.

In the course of the argument, the LORD CHANCELLOR said that if there had been nothing more in the case than that the settlement was made upon the marriage, he thought that the remainders would have been held to be voluntary, and void against a subsequent purchaser; but that he could not make up his mind to say that the Act of Parliament, and the conveyance by Lady Jane Legard made no difference in the case.

At the close of the reply, his Lordship, after observing that that part of the estate which was affected by the Act of Parliament could only be sold by a contract with the trustees, delivered the following judgment:

It appears to me at present that it is impossible to confirm these decrees. This is a bill brought by creditors of Sir John Legard, who made a settlement in the year 1782. The creditors by whom this bill is filed are persons whose debts were contracted subsequently to the date of the settlement, and if they can file any bill at all, it must be upon the principle that [*294] Sir John Legard, having entered into a contract *to sell this estate, has given them a right to say that he converted the fee simple of the premises into personal estate; that he divested himself of all title to those premises as land, and became entitled to consider himself as a creditor of Mr. Watt for 15,500*l.*; and that Digby Legard not choosing to enforce the contract, they have a right to do so. It is infinitely too late to comment on the original decisions on the statute of Elizabeth; but when one looks at the terms of the statute, one is certainly a little surprised to hear it said that if a man upon his marriage thinks proper, after providing for his issue, to limit his property to his own brothers and sisters, that is so fraudulent a thing that the party is to be considered guilty of a misdemeanor. It has been determined in this court that if a voluntary settlor enters into a contract to sell the estate, and files a bill to carry the contract into execution, the court will not assist him. One difficulty in the way of assisting him is, that he has no equity to defeat the act which he has done himself; but another consideration

1822.—Johnson v. Legard.

which has weighed in such cases is, that if you compel a purchaser to take an estate at the instance of such a man, you cannot be quite sure that there may not have been some intermediate acts, which by matter *ex post facto* may have made the settlement good, which in its origin was not good. It cannot be denied, with respect to persons who make voluntary settlements, and those who are called volunteers, that they may come to such future bargains as to make that which was originally voluntary no longer to be so considered. Then how does this case stand? After this settlement was made, Sir John Legard applied to Parliament to enable him to sell a portion of the settled estates, and Parliament granted the application. There can be no doubt that Parliament would not have done that without the consent of all the persons having a present interest in *the [*295] estate; and without entering into the question, what would be the effect of such a thing, how is it possible for me to proceed upon the opinion of the Court of King's Bench, when that court had not the circumstance before it? The case sent to the Court of King's Bench ought to have stated the Act of Parliament; and, instead of stating a simple conveyance in fee to Watt, ought to have stated such a conveyance as would in all respects have carried into effect the agreement which was made. The result is, that the case must be gone all over again, and be considered as it was in 1813. But, independently of all the questions which have arisen in this case, and without giving any opinion upon any of them, without entering into the question, whether these creditors stand in a better situation than Sir John Legard, or in the same situation as that in which he stood, I apprehend this is quite clear, that unless this court would compel Watt to take this title, the creditors cannot insist that this contract has converted into personal assets the estate contracted to be sold; and, attending to the modern doctrines of the court, it does not appear to me that I could compel a purchaser to take this title. If, however, you like to have the case sent to the Court of King's Bench again, stated in the way in which I think it ought to have been stated before, you may have it.

 1824.—Sutton v. Chetwynd.

July 23d.—The plaintiff having declined taking the case, the LORD CHANCELLOR said, then the decisions must be reversed : but I do not wish anything which I do to involve a doubt as existing on my mind upon the opinion of the Court of King's Bench. Adverting to the nature of the agreement—adverting to the Act of Parliament, and to the difficulty which there would be in making a title in any state of the case—and adverting also to the question, whether the creditors have a right to institute [*296] this suit for the purpose of *compelling the purchaser to take this property, if a good title could be made, when he could not have been compelled to take it, if the bill had been filed by the person with whom he contracted, I think this bill ought to be dismissed.

Bill dismissed.

SUTTON v. CHETWYND.

1824: 29th April.

THE LORD CHANCELLOR observed that this case, which had been then heard upon appeal in the House of Lords, was reported as if the question had been, whether Sir Richard Sutton was within the consideration of marriage ; and that the articles appeared to have been read in the court below to the extent only of raising that question ; but that the real question was, whether certain individuals were not purchasers for the benefit of Sir Richard Sutton.

[*297]

*JONES v. GARCIA DEL RIO.

1823: 5th, 14th and 24th July.

Some of the holders of scrip or shares of a loan cannot file a bill on behalf of themselves and the other holders to have their subscriptions returned.

Several persons having distinct demands, and not being able to sue on behalf of themselves and others, cannot be co-plaintiffs.

1823.—*Jones v. Garcia del Rio.*

The cases in which a bill can be filed by one person on behalf of himself and others, are cases in which the others have a choice between that and nothing.

Whether the king's courts will interfere upon the subject of a contract with a country which he does not recognize, or will assist in the recovery of money advanced by the subjects of this country to a colony at war with its parent state, the parent state being at peace with this country. *Quere.*

THIS was a bill filed by three persons, on behalf of themselves and all the other holders of scrip or shares of the Peruvian loan, against John Garcia del Rio and James Paroissien, who were stated by the bill to have come over from South America in the character of envoys and ministers, from a government styling itself the Peruvian government, to this country, and to have represented themselves to be empowered to contract for a loan for the use of the said government, and against Thomas Kinder the younger, the contractor for the loan, and William Everett and others, the bankers to whom the subscriptions for the loan were paid. The bill prayed that an account might be taken of the moneys which had been advanced and paid by the plaintiffs and the other holders of scrip or shares of the loan who should come in and claim the benefit of the suit, and that the plaintiffs and such other holders as aforesaid might be declared entitled to have what they had so paid returned to them, and to have the moneys paid to and remaining in the hands of the defendants, the bankers, applied for that purpose, and that an account of such moneys might be taken, and that the same might be applied accordingly, and that in the meantime the defendants, the bankers, might be restrained from parting with such moneys, and the other defendants from receiving or disposing of the same.

It appeared by the pleadings, that in October, 1822, the defendant Kinder entered into a contract for a loan of money to the defendants Garcia del Rio and Paroissien for the service of the state of Peru, to be in part secured by bonds of the Peruvian government payable to bearer; *that a great [*298] number of persons afterwards purchased from Kinder scrip or shares of the loan; that the scrip having been in many instances sold by the original holders, the plaintiffs severally

1823.—Jones v. Garcia del Rio.

became purchasers of portions of it; and that two instalments had been paid by the several holders of scrip, on account of the loan, into the hands of the defendants, the bankers. The bill proceeded upon the ground of fraud and misrepresentation, and of inability on the part of the envoys and the contractor to perfect the security which they had undertaken to give for the loan, and amongst other things the bill alleged, that no such government as the Peruvian government had ever been acknowledged by his Majesty, and that in fact there was no such government in existence, but that Peru still remained a province and dependency of the kingdom of Spain.

The defendant Kinder, by his answer, admitted that the Peruvian government had not been acknowledged as an independent state by the government of Great Britain; but he stated that there was in fact such a government in South America, and that it was an assumed government in opposition to the former government of Spain in that country, and had been formed by a revolution of the people in Peru, who had driven out the Spanish viceroy and established a government of their own; and he therefore denied that Peru still remained a province or dependency of the kingdom of Spain, and insisted that it was independent of Spain. The defendant further stated, that he was a holder of scrip on his own private account, and that he believed that the plaintiffs were not authorized by any of the other holders of scrip to institute the suit on their behalf, and that many of the other holders, if not all of them, were content to abide by their contracts to purchase such shares of the loan as they had respectively contracted to purchase, and were either ignorant of or disapproved the suit.

[*299] *The injunction prayed by the bill having been obtained *ex parte*, a motion was now made on the part of the defendant Kinder to dissolve it.

Mr. Wetherell, Mr. Heald and Mr. Roupell, in support of the motion, argued that the court could not, under the circumstan-

1823.—*Jones v. Garcia del Rio*.

ces of the case, interfere for the purpose of cancelling the loan, consistently with the general principle, that in order to set aside a contract, misrepresentation or a fraudulent suppression of facts must be established; and they insisted that the plaintiffs could not sue on behalf of themselves and the other holders of scrip, as all the holders of scrip had not a common interest, and the object of the bill was to put an end to a transaction, which many of the subscribers had undertaken for their own benefit, and were willing to persevere in.

THE LORD CHANCELLOR:—We all know that Peru was part of the dominions of Spain, and that Spain and this country are at peace, and that this country has not acknowledged the government of Peru; I want to know, whether, supposing Peru to be so far absolved from the government of Spain that it never can be attached to it again, the king's courts will interfere at all while the Peruvian government is not acknowledged by the government of this country. What right have I, as the king's judge, to interfere upon the subject of a contract with a country which he does not recognize? Another question is, whether, if individuals in this country choose to advance their money for the purpose of assisting a colony opposed to its parent state, that parent state being at peace with this country, the courts of justice *here will assist them to recover their money, and [*300] will not leave them to get it as they can? Practically speaking, great inconvenience may result from these transactions, for if at any future time the government of this country shall be disposed to say, Peru shall still continue annexed to Spain, these creditors will immediately come to the government and say, do not accede to the arrangement, unless Spain will pay us what we have advanced to the colony. The cases where one party files a bill on behalf of himself and others, are cases where the others have a choice between that and nothing, but how can it be managed where some parties are not dissatisfied, and are disposed to abide by the contract.

1823.—*Clutton v. Pardon.*

against the motion:—Assuming that the contract is against public policy, the court cannot be called upon to enforce it, but either party, though *particeps criminis*, may call upon the court to rescind it. *Neville v. Wilkinson*,^(a) *St. John v. St. John*,^(b) *Vauxhall Bridge Company v. Spencer*,^(c) *Morris v. M' Cullock*,^(d) In *Pearce v. Piper*^(e) the object of the bill was to adjust the rights of the parties, upon a suggestion that the original contract was vicious and could not be carried into effect, and upon the Master's report that it could not be carried into execution, the contract was dissolved. In that case the bill was permitted to be filed by some, on behalf of themselves and others.

Mr. Wigram for the defendants the bankers.

[*301] *Mr. Wetherell in reply was stopped by the LORD CHANCELLOR, who said that the plaintiffs, if they had any demand at all, had each a demand at law, and each a several demand in equity; that they could not file a bill on behalf of themselves and the other holders of scrip, and as they were unable to do that, they could not, having three distinct demands, file one bill; and upon that ground alone, his Lordship, without again adverting to the question, of public policy, dissolved the injunction.

CLUTTON v. PARDON

1823: 24th July.

A solicitor's bill having been partly taxed and paid, an order obtained as of course, referring the bill generally for taxation, was discharged with costs.

The conduct of the solicitor cannot be adduced in support of such an order, and the costs of affidavits upon that subject were ordered to be paid as between solicitor and client.

(a) 1 B. C. C. 543.

(b) 11 Ves. 536.

(c) 2 Madd. Rep. 356.

(d) Ambler, 432.

(e) 17 Ves. 1

1823.—Clutton v. Pardon.

Where a party has a pressing necessity for papers in the hands of his solicitor, the court will order them to be delivered up upon a deposit being made sufficient to cover the amount of the solicitor's bill and the costs of the taxation.

An order directing the costs of the suit to be taxed, warrants a taxation up to the time of the Master's making his report.

THIS was a motion to discharge the common order, made as of course by the Master of the Rolls, upon the petition of William Clutton, the personal representative of Thomas Clutton, for the taxation of a bill of costs delivered by a solicitor, and for the delivery upon oath of all papers in the possession of the solicitor belonging to the petitioner upon payment of the bill. It appeared by the affidavit of the solicitor in support of the motion, that the papers in the cause came into his hands in the year 1799, as solicitor for the then defendants, the executors of the said Thomas Clutton, who were all since dead; that in the year 1807, an order was made in the cause, by which it was referred to the Master to tax all parties, their costs of the suit as between solicitor and client; that in April, 1812, his bill of costs on the part of the defendants, the executors, was left in the Master's office, and that in June, 1812, the bill was taxed at 482*l.*; that in June, 1817, 300*l.* was paid to him on account of his bill, and that in *January, 1823, a copy of the bill, [*302] being in fact the bill by the order in question referred for taxation, showing the balance of 132*l.* in his favor, was sent by him to the solicitors of the said William Clutton, by whom he had been applied to for the delivery of the papers, belonging to the estate of the said Thomas Clutton; that the balance of 132*l.* was paid to him in February, 1823, and that all the papers belonging to the estate of the said Thomas Clutton had since been delivered by him to the said William Clutton. The affidavits in opposition to the motion, after impeaching the conduct of the solicitor, by imputing to him that he had been guilty of a breach of confidence, in having given to another person a paper in the cause of a private nature to be made use of for purposes prejudicial to the testator's family, proceeded to state, that the bill of costs carried into the Master's office had only been partly taxed in June, 1812, several items having been marked as re-

1823.—Clutton v. Pardon.

quiring further explanation ; that the taxation had never been completed, and no certificate or report had been made by the Master ; and that several items had been lately added to the bill which had never been taxed at all. It was further represented by those affidavits that, before the order in question was obtained, a special motion had been made before the Vice-Chancellor for the taxation of the bill, and that his Honor had refused it, upon the ground that the object might be obtained by a common order, and that a notice of motion was unnecessary and irregular.(a)

Mr. *Hart* and Mr. *Barber*, in support of the motion, [*303] contended that where a solicitor's bill had been *paid and the payment acquiesced in, the court would not refer it for taxation as a matter of course, and cited *Langstaffe v. Taylor*,(b) and *Plenderleath v. Fraser*.(c)

Mr. *Wetherell* and Mr. *Ching*, against the motion, argued that if upon the whole matter the bill must be taxed, the court would not discharge the order ; they distinguished the case from those which had been cited by the want of acquiescence, and insisted that mere payment of a solicitor's bill was not sufficient to bar the right to taxation. They stated that the object of the parties in obtaining the order was to have the papers delivered up upon oath.

THE LORD CHANCELLOR :—This is a motion to discharge an order made by the Master of the Rolls upon a petition perfectly of course, and in answer to such an application nothing more was required on the part of those who obtained the order, than to show that they were entitled to it as of course. The question of conduct has nothing to do with this case, and it was improper to

(a) In *Ex parte Hewitt*, in the matter of *Morris, Bucks Bank*, Cas. 388, the Vice-Chancellor is reported to have said, after consulting Mr. Crofts, the Registrar, that the uniform practice was to order a solicitor's bill to be taxed as of course, and if there were any special circumstances in the case, the solicitor might make a special application to the court to modify or discharge the order.

(b) 14 Ves. 262.

(c) 3 Ves. and Beam. 174.

1823.—Clutton v. Pardon.

enter into affidavits upon that subject with respect to an order of course and a motion to discharge that order. It is clear to me that, as to those affidavits, this order must be discharged with costs as between solicitor and client. If the conduct of the solicitor was such as to entitle the parties to a taxation of the bill on that ground, it ought to have been the subject of a special application. With respect to the point of practice, where a person means to have a bill taxed, if he thinks proper to pay that bill, he does not thereby necessarily waive the right to taxation; he may intimate that he pays it without prejudice to taxation, and there may be cases where, without one word being said, he *would have a right to have the bill taxed. Every [*304] attorney has a right to hold papers till his bill is paid; the language of every order which is made upon the subject is, that upon payment of what is due the papers shall be delivered over; but where a party has a pressing necessity for papers, the court will order them to be delivered over upon a deposit being made, which will cover not only what is due upon the bill, but what may be due for the costs of the taxation.

With respect to the circumstances of this case, it was not explained to the solicitor that there was to be a taxation of his bill, but even if it had been so explained, what had passed before was sufficient to make the application for taxation the subject of a special motion, instead of a motion of course. If the bill was to be taxed under the order made in 1807, the proper course was to take out a warrant to go on with the taxation; unless I am mistaken that order would warrant the taxation of the costs of the suit up to the time of the Master's making his report, but for fear I should be mistaken about that I will lay it out of the case. It would be a long time before I could consent to say, that if a bill was carried into the Master's office for taxation, and the Master went through part of that bill, a party could come here upon a petition of course, not to have the authority of the court to go on with the taxation already begun, but for an order for some other Master to begin again and tax the whole of that bill; but if upon the credit of the taxation the bill has been in part paid, how is it

1823.—Rodenhurst v. Tudman.

possible to say that a motion of course can be made to tax that bill. The only question which I have to decide is, whether this order has been regularly obtained; I think it has not been regularly obtained. Let the order be discharged with the common costs, and as to so much of the affidavits as relate to conduct, let the costs be paid as between solicitor and client.

[*305]

*RODENHURST v. TUDMAN.

1823: 24th July.

Motion to stay the execution of a writ of inquiry of damages, not supported by the ordinary affidavit upon a motion to stay trial, refused with costs.

THE plaintiffs having suffered judgment by default in an action for breach of covenant brought against them as the executors of James Rodenhurst by the defendant Tudman, the *Attorney-General* and Mr. *Phillimore* moved on their behalf, that the common injunction, which had been obtained for want of answer, might be extended to stay the execution of a writ of inquiry of damages, and of all further proceedings in the action until the defendant Tudman should put in his answer, and the court make further or other order to the contrary. The motion was supported by an affidavit that the rights of Tudman under the covenant were disputed by other parties, co-defendants to the bill, and could only be determined by a court of equity, and that the damages could not be safely assessed till the rights of all parties were determined by the court, and accounts taken of the real and personal estates of James Rodenhurst, for which purposes the bill was filed.

The LORD CHANCELLOR, upon the motion being opened, said, I do not recollect any instance of staying trial or staying the execution of a writ of inquiry of damages, except where a party wants discovery to aid him in the trial. This is in effect a motion to stay trial, and being a motion to stay trial, the

1823.—Wade v. Saunders.

question is whether there is the ordinary affidavit. Another objection to the motion is, that until there is a decree in this court I have no right to prevent a man from going to judgment; can I say he shall not have a preference over other creditors?

Motion refused with costs.

*WADE v. SAUNDERS.

[*806]

ROLLS.—1823: 25th July

The court refused to take the consent of a married woman to give up her reversionary interest, in part vested, and in part contingent in a fund in court, in favor of a purchaser from her husband.

EDWARD SAUNDERS, by his will dated the 8th of October, 1799, gave and bequeathed to Helen Saunders, her executors, administrators and assigns, the sum of 6,000*l.*, upon trust to invest the same in some public stocks or funds, and to pay the dividends or interest thereof to his daughter Helen Wade and her husband John Wade during their lives and the life of the survivor, and after the death of the survivor, upon trust for the children of his said daughter Helen Wade by her said husband John Wade, equally to be divided between them on their severally attaining the age of twenty-one years, with benefit of survivorship in case of the death of any of them under that age.

After the death of the testator this suit was instituted, and the legacy of 6,000*l.* was, under the directions of the court, invested in the purchase of 11,000*l.* 3 per cent. consol. bank annuities, which was transferred into the name of the Accountant-General in trust in the cause.

A petition was now presented by Matthew Handcock and Helen Maria his wife, and by John Samuel Schwenck, which, after stating to the effect above stated, and that the said John Wade and Helen his wife were still living, and had nine chil-

1823.—Hughes v. Wynne.

dren, and that the petitioner Helen Maria Handcock was one of those children and had attained her age of twenty-one years, but that seven of the other children were under that age, went on to state, that the petitioners Handcock and wife had contracted with the petitioner Schwenck for the sale to him of their reversionary interests, as well vested as contingent, in the said [*307] sum of 11,000*l.* 3 per cent. consol. *bank annuities, but that the petitioner Schwenck was unwilling to complete the purchase, unless the petitioner Helen Maria Handcock would forego all her rights in the said stock; the petition therefore prayed, that the petitioner Helen Maria Handcock might be examined for the purpose of testifying her consent to the transfer of her share or shares of the said stock to the petitioner Schwenck.

The MASTER OF THE ROLLS, upon the petition being opened, refused to take the consent.

Mr. *Barber* for the petition.

HUGHES v. WYNNE.

ROLLS.—1823: 28th July.

Where real estates are devised in trust for the payment of debts, in aid of the personal estate, the Statute of Limitations does not run in equity after the death of the testator.

ROBERT WATKINS WYNNE, by his will, dated the 15th of October, 1805, directed that all his just debts and funeral and testamentary expenses should be fully paid and satisfied out of his personal estate as far as the same would extend, and afterwards out of the fund thereafter directed and appointed for that purpose; and after giving several pecuniary legacies, charged upon the surplus moneys to arise from the sale of an estate, which, by an indenture dated the 5th of October, 1805, he had conveyed to trustees in trust to sell for the purpose of dischar-

1823.—Hughes v. Wynne.

ging several incumbrances and debts, including the simple contract debts then due and owing from him, the testator gave and devised certain other estates to trustees for the term of 500 years, as an auxiliary fund for raising such sum as might be wanted, in aid of his personal estate and the estate directed to be *sold, for the payment and discharge of his debts and [*308] funeral expenses; and he authorized his trustees to raise, by mortgage of the estates comprised in the term, such sums of money as might be wanted for the purpose last mentioned. The testator died in 1806, and by the decree in this suit, which was instituted by the trustees in 1814, it was referred to the Master to take an account of his debts with the usual directions.

The Master, by his report, stated that several charges had been brought in before him on behalf of persons claiming to be creditors of the testator in respect of debts due to them on simple contract, but that the testator having died in 1806, and the bill in this cause not having been filed till 1814, a period of eight years, without any proceedings being taken for the recovery of the said debts, he had not thought fit to allow the same, conceiving them to be barred by the Statute of Limitations. One of the creditors by simple contract having excepted to this report, the exception now came on to be argued.

Mr. Agar for the exception, contended that where a trust was created for the payment of debts, they could not be barred because the trustee did not execute the trust; he cited *Executors of Fergus v. Gore*,^(a) and *Morse v. Langham*.^(b)

Mr. Wingfield in support of the Master's report, argued that the creditors having omitted to claim for so long a period, the court would, by analogy to the Statute of Limitations, assume that their claims had been satisfied.

Mr. Shadwell, Mr. Roupell, Mr. Tinney and Mr. W. Parker, appeared for the other parties.

(a) 1 Sch. & Lef. 107.

(b) 2 Ves. and Beam. 280.

1823.—Cooke v. Davies.

[*309] *THE MASTER OF THE ROLLS :—The question is how the debt stood at the death of the testator ; it is not to be inferred that a man has no debt, because he does not go to law to enforce payment when he has a trustee to pay him.

The exception was allowed.

COOKE v. DAVIES.

1823 : 26th, 30th and 31st July.

Where a plaintiff amended his bill after answer, but did not serve a subpoena to answer the amendments or file a replication to the answer, an order obtained as of course to dismiss the bill for want of prosecution, after three terms from the filing of the answer, but within three terms of the date of the amendments, was held to be regular, though the defendant had obtained an order that the plaintiff should amend his bill within a limited time, and the plaintiff had amended accordingly, and had also amended the defendant's office copy of the bill.

Where a bill is amended after answer, but no subpoena is served to answer the amended bill, the amendments go for nothing.

THE bill in this cause was filed on the 14th of July, 1821, and an answer having been put in, the bill was amended ; the defendant put in her answer to the amended bill on the 4th of February, 1822, and on the 21st of June following, the plaintiff obtained a second order to amend ; on the 10th of April, 1823, no amendment having been made, the defendant moved to discharge the order to amend, and to dismiss the bill for want of prosecution, but the plaintiff met the motion by undertaking to amend within ten days ; he accordingly amended his bill within the limited time, and also amended the defendant's office copy, but he neither filed a replication to the answer, nor served a subpoena to answer the amendments ; the defendant, therefore, on the 13th of July following, obtained the common order to dismiss the bill for want of prosecution, upon the allegation, that no further proceedings had been had in the cause since the answer was put in to the amended bill.

1823.—*Harris v. Lloyd*.

A motion was now made to discharge the order of dismissal for irregularity.

**Mr. Heald* for the motion.

[*310]

Mr. Richards against it.

THE LORD CHANCELLOR:—I have always understood, that if a bill is filed, and an answer is put in, and then an order is obtained to amend, and the bill is amended, but no subpoena to answer the amended bill is served, the amendments go for nothing. The question is, whether it makes any difference, that after the order to amend, the defendant obtained an order that the amendments should be made within ten days, and the amendments were made within that time.

The Registrar was directed to inquire into the practice, and upon the result of that inquiry the motion was refused with costs.

HARRIS v. LLOYD.

1823: 8th July and 1st August.

Illegitimate children not entitled under the description of children in a will, the intention not being sufficiently apparent upon the face of the will. Legacy in trust for the children of A. to be equally divided between them with benefit of survivorship and a provision for maintenance out of the interest, A. having no children at the death of the testator: held, that after-born children would take, and that the interest till the birth of a child fell into the residue.

The interest of a legacy not expressly disposed of by a will till the persons come into existence who are to take the capital, falls into the residue.

EDWARD HARRIS, by his will dated the 10th of October, 1809, devised to his executors all the estates of which he was seised in mortgage, upon trust, on payment of the mortgage moneys, to convey the same to the persons entitled to the equity of redemption thereof; and after bequeathing the sum of 5,000*l.*, part of

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the moneys to be received in respect of the mortgages, upon certain trusts for the benefit of Edward Goring and James Goring, he directed his executors to invest the residue of such moneys upon mortgage or in the funds, and to stand possessed [*311] of the same, in trust for all and every *the child and children of his son Edward Harris, if more than one to be equally divided between them share and share alike, the shares of sons to be vested at twenty-one, and to be paid or transferred at twenty-five, and the shares of daughters to be paid or transferred at twenty-one or marriage, with benefit of survivorship as to the shares of children dying under twenty-one, and a direction that until the shares of the children should become payable, the dividends and interest of the trust funds or securities should be applied in their maintenance and education; the testator gave to Sarah Byrne all the rest and residue of his estate and effects.

After the death of the testator a suit was instituted by Edward Goring and James Goring, and by three infants who were represented to be the children of Edward Harris, the son, for an account of the moneys due to the testator upon mortgage at the time of his decease, and the mortgage moneys, amounting to the sum of 8,400*l.*, having been received by the executors, were paid into court and invested. By the decree, part of the fund in court was appropriated to answer the legacy of 5,000*l.*, and it being declared that the infant plaintiffs, if they were the only children of the said Edward Harris, the son, were entitled to the remainder of the fund, it was referred to the Master to inquire what children the said Edward Harris, the son, had at the testator's death, and whether he had had any children born since that time. In the further progress of the suit, the Master having reported that Edward Harris, the son, had at the death of the testator three children only, the three infant plaintiffs, and that he had had no child born since the testator's decease, an order was made that the interest of the unappropriated part of the fund in court should be applied in the maintenance of the infant plaintiffs, their father not being of ability to maintain

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them. The payment of maintenance was afterwards *suspended by an order dated the 1st of *February, [*312] 1821, made upon the petition of the defendants, the executors, stating that no proof had been adduced of Edward Harris, the son, having ever been married, and submitting that the infant plaintiffs, if they were illegitimate, were not entitled to any benefit under the will of the testator. A supplemental bill was then filed by the infants, stating that they were always treated by the testator as his grandchildren, and boarded and maintained at his expense, and that Edward Harris, their father, had no other child, and setting forth a deed, dated subsequently to the filing of the original bill, by which Sarah Byrne assigned to trustees, in trust for them, all such interest in the funds in question as she was entitled to as residuary legatee of the testator, in case there were no children of the said Edward Harris, the son, to take by that description under the testator's will.

A petition presented by the infants, insisting that they were entitled to the dividends of the unappropriated part of the fund in court by virtue of the deed, independently of the question of legitimacy; and the effect of the bequest contained in the testator's will; and, therefore, praying that the order of the 1st of February, 1821, might be rescinded, and that the dividends accrued and to accrue due upon the fund in question might be applied in their maintenance, now came on to be heard with the supplemental suit.

Mr. *Sugden* and Mr. *Willis* in support of the petition:—Without entering into the question whether the description in the will comprehends illegitimate children, the infants are entitled to the interest of the unappropriated fund in court under the deed executed by Mrs. Byrne, upon the ground, either that the gift of the residue of the mortgage money is an immediate gift to a class of persons who must be living at the death of the testator, *and that there not having been then any legit- [*313] imate children, the gift altogether failed, and the particular residue fell into the general residue; or that the interest of

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the particular residue until the birth of a legitimate child is undisposed of, and forms part of the general residuary estate. Upon the first point they relied upon the provision for maintenance, as evidence of intention that the persons who were to take the fund were to be in existence at the death of the testator, and cited *Godfrey v. Davis*,^(a) and *Davidson v. Dallas*.^(b) Upon the second point they cited *Wyndham v. Wyndham*,^(c) *Shawe v. Cunliffe*,^(d) and *Leake v. Robinson*.^(e)

Mr. *Shadwell* and Mr. *Seymour* for the executors.

Mr. *Spence* for Edward Goring and James Goring.

THE LORD CHANCELLOR :—Three questions arise in this case ; first, whether the persons who claim as children are children within the meaning of the testator, and according to the legal construction of the word ; secondly, whether the intention of the residuary legatee in favor of those persons can, as it respects the principal of the fund, be carried into execution, regard being had to the circumstance that the individual whose illegitimate children have been considered to be the persons intended by the testator may have legitimate children ; and thirdly, whether, according to the cases of *Wyndham v. Wyndham* and *Shawe v. Cunliffe*, the interest of the residue of the mortgage money does not fall into the general residue until there is a legitimate child ;

I have not the least doubt that this testator meant illegitimate children, but I am clearly of opinion *that [*314] there is not enough upon the face of this will to authorize me to carry that intention into effect.^(g) With respect to the bulk of the residue of the mortgage money, if there shall be legitimate children, it will become their property. With respect to the interest of that residue, upon the best consideration which I can give the subject, I think this case falls within the author-

(a) 6 Ves. 43.

(d) 4 B. C. C. 144

(b) 14 Ves. 576.

(e) 2 Meriv. 363.

(c) 3 B. C. C. 58.

(g) *Cartwright v. Vawdry*, 5 Ves. 530; *Swaine v. Kennerly*, 1 Ves. & Beam. 469.

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ity of the cases in which it has been held that where there is an interval in which the interest is not disposed of expressly by the will, before the persons come into existence who are to take the capital, the interest falls into the residue.

The order was accordingly made.

IN RE MAGOR.

1823: 28th July and 4th August.

Upon a motion for a prohibition, a copy of the libel in the ecclesiastical court verified by affidavit, and a suggestion on parchment setting forth the libel and the ground of the prohibition prayed, must be delivered into court, and if the prohibition is granted, affidavits of the truth of the facts suggested must be filed within six months.

In the year 1820, the lessees of the tithes of a parish, in the diocese of Exeter, instituted a suit in the consistorial court of the diocese, against John Magor for the subtraction of the tithes of corn; the defence made to the suit was, that the lands in respect of which the tithes were demanded were, down to the year 1817, barren and unproductive, and were, therefore, by law exempt from the payment of tithes; witnesses having been examined by both parties on the subject of the exemption set up by the defendant, the cause was heard before the chancellor of the diocese of Exeter, on the 20th of July, 1822; but before sentence was pronounced an order was made by his Honor the Vice Chancellor, prohibiting the chancellor of the diocese and the lessees of the tithes from further proceeding upon *the [*315] matters in question in the consistorial court, and directing a writ of prohibition to issue accordingly; this order was obtained upon the motion of Mr. *Knight*, made *ex parte* and supported by an affidavit, which, after setting forth the substance of the pleadings in the consistorial court, and stating the belief of the deponent that the lands in respect of which the tithes were

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demande were barren and unproductive down to the year 1817, and were exempt from the payment of tithes under the provisions of the statute 2d and 3d Edw. 6, c. 13, (a) alleged that the [*316] *trial of the question whether lands were barren or not barren within the before-mentioned statute, belonged as the deponent was advised and believed, to the temporal courts of the realm, and not to any spiritual court. (b) On the 11th of December, 1822, a writ of prohibition issued according to the or-

(a) The 5th and 14th sections of the statute are in the following words:—

Section 5.—Provided always, and be it enacted by the authority aforesaid, that all such barren heath or waste ground, other than such as be discharged for the payment of tithes by Act of Parliament, which before this time have lain barren and paid no tithes by reason of the same barrenness, and now be and hereafter shall be improved and converted into arable ground or meadow, shall from henceforth, after the end and term of seven years next after such improvement fully ended and determined, pay tithe for the corn and hay growing upon the same; anything in this act to the contrary in any wise notwithstanding.

Section 14.—Be it further enacted by the authority aforesaid, that if any party at any time hereafter, for any matter or cause before rehearsed, limited or appointed by this Act, to be sued or determined in the king's ecclesiastical court, or before the ecclesiastical judge, do sue for any prohibition in any of the king's courts where prohibitions before this time have been used to be granted, that then in every such case the same party, before any prohibition shall be granted to him or them, shall bring and deliver to the hands of some of the justices or judges of the same court where such party demandeth the prohibition, the very true copy of the libel depending in the ecclesiastical court, concerning the matter wherefore the party demandeth the prohibition, subscribed or marked with the hand of the same party: and under the copy of the said libel shall be written the suggestion wherefore the party so demandeth the said prohibition; and in case the said suggestion, by two honest and sufficient witnesses at the least, be not proved true in the court where the said prohibition shall be so granted, within six months next following after the said prohibition shall be so granted and awarded, that then the party that is letted or hindered of his or their suit in the ecclesiastical court by such prohibition, shall upon his or their request and suit, without delay, have a consultation granted in the same case in the court where the said prohibition was granted; and shall also recover double costs and damages against the party that so pursued the said prohibition, the said costs and damages to be assigned or assessed by the court where the said consultation shall be so granted; for which costs and damages the party to whom they shall be awarded may have an action of debt, by bill, plaint or information, in any of the king's courts of record, wherein the defendant shall not wage his or their law, nor have any essoin or protection allowed or admitted.

(b) *Anon.*, 1 Keb. 253.

 1823.—*In re Magor.*

der,(a) and on the 26th of March following, a further affidavit was, in compliance with the requisitions of the statute filed by Magor and two other persons to the same effect as the affidavit upon which the order was obtained.

A motion was now made on behalf of the lessees of the *tithes that the order of the Vice Chancellor might [*317] be discharged, and that the prohibition issued by virtue thereof might be superseded for irregularity, or that a writ of consultation might issue, directed to the proper officer of the consistorial court of Exeter, and that the said John Magor might be ordered to pay to the lessees all costs occasioned thereby and by such *supersedeas*, to be taxed according to the statute in that case made and provided.

Mr. *Shadwell* and Mr. *Pemberton* in support of the motion :—The formalities prescribed by the statute not having been pursued, the writ of prohibition in this case has issued irregularly. The statute requires that a copy of the libel in the ecclesiastical court shall be delivered to the judge from whom the prohibition is demanded, with the suggestion underwritten why the party demands the prohibition; and it appears from Sir Gilbert Gerard and *Sherrington's Case*(b) always to have been considered necessary that surmises should be delivered to the court. There are many cases in Coke's entries(c) which show that the old mode

(a) The mandatory part of the writ was in the following form: "We, therefore, willing to maintain the laws and rights of our crown of England, as by the obligation of our oath we are bound, and unwilling that our liege subjects should be injured by suspension in contradiction thereto, do prohibit you and each of you firmly enjoining that you do not further proceed in the premises against the said John Magor, nor any further hold plea before you touching the premises, nor that you or any of you attempt anything that may tend to the damage of the said John Magor, or to our prejudice, or in derogation or contempt of the laws, statutes and customs of our kingdom of England, or to the hurt of our crown, under the damages of incurring the penalty of the violations of our laws: and if you have pronounced against him the said John Magor by reason of the premises, release him therefrom, and absolutely absolve him from the same on the peril incumbent."

(b) 1 Leon. 286.

(c) Prohibition, 448.

1823.—In re Magor.

of proceeding, where a person sued in the ecclesiastical court considered himself entitled to a prohibition, was, for the party to declare in prohibition; issue was joined; the facts were found by a jury; and the judgment of the court was pronounced upon the finding of the jury; but the modern practice of the courts of law is to grant prohibitions upon motion. The courts of law, however, whether the application is made upon motion or by declaration in prohibition, take care that an opportunity shall be afforded to the adverse party of disproving the facts upon which the prohibition is applied for. It is not disputed [*318] that this court may issue the writ upon motion; (a) *but in *Sibley v. Crawley* (b) it was said that a prohibition was not duly granted upon an English bill, and from that case it may fairly be inferred that a prohibition ought not to issue from this court till after trial of the facts. Some opportunity should be given of trying the question whether the prohibition ought to issue. (c) In *Blackborough v. Davis*, (d) it is said that the prohibition should be returnable into the King's Bench or Common Pleas. The conduct of the party has precluded him from any right which he might have had; having permitted the question to be tried in the ecclesiastical court, he cannot now be allowed to come to this court and complain of that trial. *French v. Trask*. (e)

Mr. *Knight*, against the motion, contended that the question between the parties was of such a nature that the common law would not permit the trial of it to be entrusted to the ecclesiastical court, and relied upon the affidavits as a compliance with the requisitions of the statute; he cited 4 Institute, 81, as an authority that the writ ought not to be returnable.

THE LORD CHANCELLOR:—Do the courts of common law when they grant a prohibition, require that the affidavit should

(a) *Anon.*, 1 P. Wms. 475.(b) *Cro. Eliz.* 736.(c) In *Saunderson v. Clagget*, 1 P. Wms. 657, a prohibition *nisi causa* seems to have been granted by the Master of the Rolls.

(d) 1 P. Wms. 43.

(e) 10 East, 343.

1823.—In re Magor.

state a copy of the libel? The reason I ask is, that in case the truth of the suggestion is not proved within a given time after the prohibition is granted, the court which granted the prohibition is to grant a consultation; and then the statute gives an action. Now, if the action is brought, how can it be maintained if it can be shown that the prohibition was granted without *the affidavit which the statute requires. I will [*319] communicate with the judges of the Court of King's Bench upon the subject.

August 4th.—THE LORD CHANCELLOR:—The chief justice of the King's Bench has stated to me that the practice of the Court of King's Bench is in exact conformity with the statute 2 & 3 Edw. 6; upon a motion for a rule to show cause why a prohibition should not issue, a copy of the libel in the ecclesiastical court verified by affidavit, and a suggestion on parchment setting forth the libel and the ground of the prohibition prayed, are delivered into court, and if a prohibition is granted, affidavits of the truth of the facts suggested are filed within six months. The consequence is, that unless it can be shown that the statute does not apply to the Court of Chancery as well as the Court of King's Bench, this prohibition has improperly issued. I can find nothing in the statute to distinguish this court from the Court of King's Bench, and the prohibition, therefore, must be superseded.

His Lordship doth order that the said writ of prohibition be superseded.

Reg. lib. 1822, B. 3, 1600

1823.—Jarvis v. Chandler.

JARVIS v. CHANDLER.

1823: 2d and 4th August.

Injunction granted to stay proceedings upon a sentence in the Admiralty Court, new evidence having been discovered at a period, when, according to the practice of that court, it could not be received.

A SUIT having been instituted in the Admiralty Court by Elizabeth Stephens, for the recovery of the sum of 64*l*. [*320] 1*4s.* *alleged to be due to her for wages as cook and steward of a small trading vessel, the owners of the vessel defended the suit, on the ground that Elizabeth Stephens was in fact the wife of Christopher Chandler, the captain of the vessel, and was not, therefore, entitled to any wages. Until a late stage of the cause in the Admiralty Court, when, according to the rules of that court no new evidence could be received, the owners were unable to procure satisfactory proof of the marriage of Christopher Chandler and Elizabeth Stephens, but it was then discovered that those persons had repeatedly admitted that they were married, and that the proceedings in the Admiralty Court were taken with the privity, and for the benefit of Chandler.

Under these circumstances, Elizabeth Stephens having obtained sentence in her favor in the Admiralty Court, the owners filed a bill in this court against her and her husband for an injunction to restrain them from proceeding to enforce the sentence.

Mr. *Hart* and Mr. *Koe* now moved for the injunction, and that service of it on the defendant's proctor might be deemed good service, upon certificate of bill filed, and an affidavit stating the facts of the case, and that the defendants could not be found.

The LORD CHANCELLOR expressed a doubt whether he ought to grant the injunction, as there was no direct evidence of the marriage; observing, that nothing was more easy than to obtain evidence of the declarations of persons in such a situation of life

 1822.—*Jarvis v. Chandler.*

that they were married, though in fact they were not. His Lordship desired the motion to be mentioned again.

August 14th.—Mr. Hart and Mr. Koe now contended, that this case resembled those in which the court had interfered by injunction *to restrain proceedings on a judgment [*321] at law, where circumstances had been afterwards discovered, which rendered it inequitable that the plaintiff should reap the fruits of that judgment.

THE LORD CHANCELLOR:—Upon payment into court of the sum recovered, and of the costs in the Admiralty Court, you may take the injunction till answer or further order. My judgment proceeds upon the notion that the proceedings in the Admiralty Court are perfectly right. The question is whether this is not the same special case as if there had been a trial at law and a verdict obtained to be affected in equity by subsequent discovery.

His Lordship doth order, that the said plaintiffs do, on or before the first seal before next Michaelmas Term, pay the sum of 64*l.* 14*s.*, and the defendant's taxed costs in the Admiralty Justice Court into the bank to the credit of this cause, subject to the further order of this court; and it is ordered, that the said defendants Christopher Chandler and Elizabeth his wife, otherwise Elizabeth Stephens and their proctors or agents, be restrained by the injunction of this court from applying to the Admiralty Justice Court for or issuing any process to compel execution of the sentence obtained by the said defendant Elizabeth Stephens, otherwise Chandler, in the said court, until the said defendants shall fully answer the plaintiff's bill, or this court make other order to the contrary; and it is ordered that service of the said injunction on Frederick Clarkson, the said defendant's proctor or agent, be deemed good service on the said defendants.

Reg. Lib. 1822, A. 3, 2248.

On the first seal before Michaelmas Term application
*was made that the time for paying in the money might [*322]

1823.—*Street v. Street.*

be extended, upon an affidavit, that although diligent search had been made for the defendants, in order to serve them with a subpoena, they had not been found; and the court extended the time for one month.

Several subsequent applications were made of the same nature upon similar affidavits, and ultimately the court ordered, that the time for paying in the money should be extended until one month after the defendants should have put in their answers to the bill.

STREET v. STREET.

1823: 5th and 7th August.

The writ of *ne exeat regno* does not issue for alimony after a decree in the ecclesiastical court pending an appeal from that decree.

The writ of *ne exeat regno* is not granted for interim alimony before a decree.

THE bill in this cause stated, that the plaintiff, a married woman, had instituted a suit in the ecclesiastical court of Exeter, against the defendant, her husband, for a divorce, and had obtained a decree for alimony with costs. The bill then stated that arrears of alimony and costs were due to the plaintiff, and prayed the writ of *ne exeat regno* against the defendant.

The defendant, by his answer, stated that he had appealed against the sentence of the court at Exeter, as to the alimony allotted to the plaintiff, to the court of arches, and that such appeal was pending before the bill was filed, and that the plaintiff having, before filing her bill, applied to the court of arches in the matter of the said appeal for alimony pending such appeal, that court had allotted to her, *pendente lite*, the same alimony which before sentence in the court at Exeter had been allotted there, *pendente lite*, namely, 19s. a week. The defendant further stated, that he was advised, that by the ecclesiastical [*323] law, and *according to the practice of the ecclesiastical

 1823.—*Street v. Street.*

court, the plaintiff had not under the circumstances become entitled to receive from him any alimony whatever, save the said sum of 19s. a week.

The writ, which had been granted upon the filing of the bill, was discharged by the Vice-Chancellor upon the coming in of the answer.

Mr. *Hart* and Mr. *Rose* now moved to stay the order for discharging the writ, and contended that the decree of the ecclesiastical court must be considered to be good till it was judicially reversed, and to show the competency of the court to grant the writ after a decree for alimony, they cited *Shafloe v. Shafloe*,^(a) *Dawson v. Dawson*,^(b) and *Haffey v. Haffey*.^(c)

Mr. *Knight* opposed the motion.

THE LORD CHANCELLOR:—The ecclesiastical court, looking at the obligation upon the part of the husband to maintain his wife so long as she is his wife, gives alimony *pendente lite* until a decree is made; but, if I recollect the authorities, this court will not grant the writ of *ne exeat regno* for interim alimony before a decree. It strikes me, that according to the practice of the ecclesiastical courts, if there is an appeal, the alimony given by the decree is not understood to be due. The question, therefore, comes to this, whether, if the ecclesiastical court, when there is an appeal, considers the matter as undetermined, and revives the alimony *pendente lite*, things are not exactly in the same state after the decree as before it.

August 7th.—*THE LORD CHANCELLOR:—From the [*324] information which I have received as to what the court which makes the decree for alimony considers to be the effect of its own judgment I am of opinion that this writ ought not to be granted.

(a) 7 Ves. 171.

(b) 7 Ves. 173.

(c) 14 Ves. 261.

1823.—*Ostle v. Christian*.

OSTLE v. CHRISTIAN.(a)

1823: 16th August.

A solicitor cannot obtain the taxation of his agent's bill without bringing the amount into court.

A SOLICITOR in the country having obtained the common order in this cause, by petition of course at the Rolls, for the taxation of a bill of 184*l*. delivered by his agent in London, and for the delivery of all papers in the possession of the agent on payment of the taxed amount of the bill, a motion was made on the part of the agent to discharge that order. The motion was supported by an affidavit, from which it appeared, that a sum of 87*l*. was due from the solicitor in the country to the agent in London on a bill previously delivered.

The *Attorney-General* and Mr. *Glyn*, in support of the motion, contended first, that the order was irregular, on the ground that an agent's bill not being within the statute, an order to tax it could only be obtained on the terms of the amount being brought into court; and secondly, that the solicitor had not acted with good faith in obtaining an order for the delivery of the papers on payment of the last bill only, suppressing the fact of the previous bill remaining unpaid.

[*825] *Mr. *Hart* against the motion.

The LORD CHANCELLOR concurred in the opinion that a solicitor could not obtain the taxation of his agent's bill without bringing the amount into court, and ultimately discharged the order with costs, observing, that in the petition at the Rolls no mention had been made of the bill for 87*l*., and that the agent ought not to have been called upon to deliver up the papers until that bill was paid.

(a) *Ex relations* Mr. *Glyn*.

1873.—*Ex parte Pearse*.

EX PARTE PEARSE.

1873: 20th August.

The costs of the committee of a lunatic trustee, conveying under the statute, must be paid by the *cestui que trusts*.

The estate being vested in the lunatic upon trusts for securing an annuity, and subject thereto upon trust for the grantor of the annuity, the grantee and the assignees of the grantor of the annuity were ordered to defray equally the committee's costs of an application by them for a reconveyance of the estate.

JOHN GOODWIN granted an annuity to Thomas Pearse, and demised an estate to John Warren Pearse for the term of 500 years upon trusts for securing the annuity, and subject thereto upon trust for Goodwin. The annuity deed contained a clause empowering the repurchase of the annuity; and it was provided by the deed, that in the event of a repurchase, the grantee of the annuity, his executors, administrators and assigns should, at the request, costs and charges of the grantor, his heirs, executors, administrators or assigns, convey or cause to be conveyed to him or them, the premises comprised in the term

John Goodwin having become bankrupt, his assignees were desirous of repurchasing the annuity, and by an order made in the lunacy, upon a petition presented by the assignees jointly with Thomas Pearse, the grantee of *the annuity [*326] it was referred to the Master to inquire whether John Warren Pearse was a trustee within the intent and meaning of the statute 4 Geo. 2, c. 10, and for whom.

The Master having reported that the lunatic was a trustee within the intent and meaning of the statute, for Thomas Pearse, the grantee of the annuity, a further petition was presented by the said Thomas Pearse, and by the assignees of Goodwin, praying that the report might be confirmed, and that the premises comprised in the term might be conveyed to the assignees.

Upon the hearing of this petition, a question arose as to the

 1823.—*Ex parte Pearse.*

costs of the committee, and the Lord Chancellor ordered the costs to be paid according to the settled rule.

The minutes of the order directed the committee's costs of all the proceedings, except the conveyance, to be paid by the grantee of the annuity, and the costs of the conveyance to be paid by the assignees of the grantor, and the question of costs having been again mentioned, the following statement with respect to the practice was furnished to the Lord Chancellor by the secretary of lunatics.

Lunatic Trustees and Mortgagees.

These cases are provided for by the 4th Geo. 2, c. 10, but it is silent as to costs, and until the time of Lord Rosslyn costs were neither prayed nor directed by the orders made for confirming the report and conveying the estate in trust or mortgage; the rule being, for the *cestui que trust* in the one case to pay the costs on the committee conveying the trust estate, and for the committee in the other to acquire the authority for executing a reconveyance, on payment of the money due on the mortgage and *the ordinary costs attending the reconveyance. It is only in modern practice that any question has been raised as to the costs in these cases, and in the case of a lunatic trustee which occurred in the lunacy of Tufnell on the 4th April, 1808, Lord Harcourt sought a conveyance of the trust estate by the committee, after the Master had reported the case to be within the statute, and an order was made to that effect by Lord Eldon, in which the costs of the committee were directed to be paid by the petitioner, the *cestui que trust*.

It has lately been attempted to throw the costs of a lunatic trustee on his own estate, on the authority of a case, *Ex parte Brydges*, reported by Mr. Cooper, where the costs of the committee were directed to be taxed and paid out of the lunatic's estate; but upon referring to the minutes of that order, it appears that no question whatever as to costs was made at the hearing, and that a direction to that effect was added for the indem-

1823.—Attorney-General v. Dove.

nity of the committee, who had omitted to obtain his costs from the *cestui que trust*. In the case of *Pearse*, a lunatic, who has been found to be a trustee within the statute, a question has been raised by the *cestui que trust* as to the costs in consequence of Mr. Cooper's report of the above case of *Ex parte Brydges*, but it is perfectly clear that, according to the old rule, as well as the modern practice, except Mr. Cooper's case, the costs of the committee ought to be paid by the *cestui que trust* as directed in the order, and not out of the lunatic's estate.

The LORD CHANCELLOR finally ordered that the committee's costs of the original petition, and of the reference to the Master and consequent thereon, and of the application and incident thereto should be paid by the grantee of the annuity and the assignees of the grantor in equal moieties; and declared the general rule to be, that the *costs of the committee [*328] of a lunatic trustee conveying under the statute, must be paid by the *cestui que trust*.

Mr. *Hart* for the petition.

Mr. *Swanston* for the committee.

ATTORNEY-GENERAL v. DOVE.

ROLLS.—1823: 5th November.

Where, in a charity information, the relators are allowed their costs of proceedings which the Attorney-General has attended separately by his own solicitor, without an order of the court for so doing, the Attorney-General will not be allowed his separate costs.

In this suit a petition was presented by the defendant, praying the confirmation of the Master's report, various consequential directions, and the payment of the costs of some of the proceedings.

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Mr. *Pollen*, for the petition.

Mr. *Roupell*, for the Attorney-General, asked, that in the order provision might be made for the payment of the Attorney-General's costs separately from those of the relators. This was proper and necessary; because, in the prosecution of the inquiries which had been directed, the same solicitor having appeared both for the relators and for the defendant, a suspicion of collusion had been excited in the Master's mind, and, at the suggestion of the Master, the Attorney-General had attended by his own solicitor to watch the progress of the suit.

Mr. *Wingfield* and Mr. *Pepys* for the relators:—The Attorney-General and the relators cannot both of them have their costs; for a charity information is not to be burdened, at the mere pleasure of the Attorney-General, or even of a Master, [*329] with two sets of plaintiffs. On *which of the two, then, must the loss fall? Not surely on the relators, against whom there is not even an accusation of having neglected their duty in the management of the suit. On the other hand, if the Attorney-General has incurred any costs apart from those of the relators, he has incurred them improperly; for, when he permits relators to use his name, he has no right to appear by a solicitor distinct from theirs. In the case of the *Attorney-General v. The Corporation of Huntingdon*,^(a) a similar application on behalf of the Attorney-General was refused by the Vice-Chancellor.

(a) This case (according to the statement made at the bar) came before the court in 1821. It was an information, in which the Attorney-General, having attended some of the proceedings by his own solicitor, claimed costs separately from the relators. The Vice-Chancellor expressed himself astonished at the application. The relators, his Honor said, were entitled to their costs, for they had conducted the suit properly; but he did not see how he could burden the charity fund with an additional set of costs. Finally, the Vice-Chancellor offered the Attorney-General an inquiry as to whether it was customary to allow separate costs to relators and to the Attorney-General. This offer, however, the Attorney-General did not think proper to accept.

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THE MASTER OF THE ROLLS:—Where the Attorney-General institutes an information at the instance of relators, it is not the ordinary practice of the court to allow him separate costs: and I am most unwilling to establish a precedent, which may tend to increase the expenses of such suits. The conduct of the cause is with the relators; and they have usually, in all the proceedings, all the costs known to the court. There is no authority in support of the demand which the Attorney-General now makes: and the case of the corporation of Huntingdon is a strong authority against him. Such is the general rule; and to exclude its application, a special case must be made.

*The only circumstance, which is stated as a reason [*380] why in this suit the Attorney-General should have costs allowed him separately, is, that it was in consequence of a suspicion entertained in the Master's office, of collusion between the relators and the defendant, and in compliance with a suggestion coming from the Master, that the Attorney-General attended the proceedings by a distinct solicitor. But the Master had no power to alter the course of practise or to increase the expenses of the suit. If there was ground for suspecting collusion, application ought to have been made to the court, when the matter would have been put into a course of inquiry. The Attorney-General, in appearing by his own solicitor, acted without the privity and sanction of the court; and the court cannot now take any notice of the occurrences in the Master's office which induced him to do what he has done. The case, therefore, must be considered as standing on the general rule.

Mr. *Roupell* submitted, that, as the Attorney-General had been served with the petition separately from the relators, he ought to be allowed at least the costs of the petition.

The court, however, refused him even this portion of the costs.

1823.—*West v. Ayles*.

WEST *v.* AYLES.

ROLLS.—1823: 5th November.

A trustee, who is in a state of mind which renders him incompetent to the management of business, may refuse to transfer within the meaning of the 36 Geo. 3, c. 90, s. 1.

By a decree made on the 17th of June, 1823, Matthews and Ayles, the surviving executors of a testator, were ordered to transfer 1,068*l.* 19*s.* 9*d.* into the name of the Accountant-General.

[*331] *Ayles had fallen into a state of mind, which rendered him incompetent to the management of business; but no commission of lunacy had been issued against him.

A petition was now presented under the 36 Geo. 3, c. 90, s. 1.(a) It alleged, that Ayles had peremptorily refused to join in transferring the stock, or to sign any power of attorney or other instrument to authorize the transfer of it. The prayer was, that the transfer might be made by the other executor, Matthews, alone.

The petition was supported by the affidavit of John Eyre Coote, who swore, that, being admitted to the defendant Ayles, he informed him that he was come for the purpose of getting him to execute a power of attorney for the transfer of stock belonging to the plaintiff; that Ayles at first replied that he could not write; but, on being solicited more urgently, said, "I won't do anything," or to that effect: that he repeated this declaration

(a) This act has been since repealed by the 6 Geo. 4, c. 74; the 7th section of which provides for the case of a trustee refusing to transfer, or to receive and pay over the dividends.

In consequence of the power given by the 4th and 6th sections of that Act to the Lord Chancellor, Lord Keeper, or Commissioners of the Great Seal, to appoint a person to convey or transfer property standing in the name of a trustee who is of unsound mind, though not found by inquisition to be so; the difficulty with which the court had to struggle in *West v. Ayles*, and *Simms v. Naylor*, can scarcely occur hereafter.

1823.—Boehm v. Wood.

several times: and that he likewise said peremptorily, "I won't sign anything," or to that effect.

The doubt was, whether, regard being had to Ayles's state of mind, such answers amounted to a refusal within the meaning of the Act.

*Mr. Moore, for the petition, cited *Simms v. Naylor(a)* [*332] as an express authority for the application.

Upon the authority of that case, the Master of the Rolls made the order according to the prayer of the petition.

BOEHM v. WOOD.

1823: 8th and 10th of November.

In a suit against a purchaser for specific performance, where a receiver had been appointed and was in possession of the estate, and the Master's report in favor of the title, except as to a very small part of the estate for which the purchaser was entitled to an abatement, had been confirmed, and followed by an order, by which, after referring it to the Master to ascertain what abatement the purchaser was entitled to, and to compute interest upon the remainder of the purchase money, and to settle the conveyances, it was ordered, that upon the execution of the conveyances and delivery thereof, and of the title deeds to the purchaser, he should pay to the plaintiffs the remainder of the purchase money, after deducting the abatement, with the interest to be computed by the Master, and that the receiver should thereupon deliver up to him possession of the estate, the court refused to discharge a writ of *ne exeat regno* issued against the purchaser, and marked for the full amount of the purchase money, though the abatement (which it clearly appeared would be less than the interest) had not been ascertained by the Master, and no steps had been taken towards the execution of the conveyances.

The sheriff having taken the defendant under the writ, refused to release him out of custody until the whole sum for which the writ was marked was paid into his hands, and the court did not disapprove of his conduct.

Where lands are allotted under an enclosure Act in respect of rights of common appurtenant to other lands of which the land tax has been redeemed, the land tax does not attach upon the allotment.

(a) 4 Vesey Jun. 360.

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Where the writ issues against the purchaser of an estate in a suit for specific performance, the circumstance that he may have property to answer the purchase money is not to be regarded. *Semble*.

What the sheriff does in the case of a writ of *ne exeat regno*, is upon his own responsibility.

Upon the defendant's stating that if the plaintiffs obtained a decree he would leave the kingdom, the writ was issued in an early stage of the cause.

The Master of the Rolls has jurisdiction to direct the writ to issue.

The debt for which the writ issues must be equitable, must be due, and must be such debt that the sum to be marked upon the writ can be ascertained.

Exception to the rule that the debt must be equitable in the case of account.

The exception founded on the difficulty of proceeding at law in such matters.

In matters of account the party may swear to his belief as to the amount of the balance.

The cases of the writ being issued in suits for specific performance, are also founded on the difficulty of proceeding at law.

The rule that the sum to be marked upon the writ must be ascertained, instanced in the case of executors.

Upon the application for the writ it need not be sworn that the party is going abroad for the purpose of avoiding payment.

Whether the writ ought to be granted merely upon the footing of contract. *Qu*.

Where a receiver is appointed in a suit for specific performance, if the purchaser is compelled to take the title, the receiver is to be considered as his receiver.

The vendor's equitable lien upon the estate not to be regarded in issuing the writ against a purchaser in a suit for specific performance.

THIS suit was instituted for the specific performance of an agreement entered into by the defendant to purchase an estate, consisting of a mansion house and park, with an adjoining farm, and the tithes of the park and farm lands, for 36,000*l*. The agreement, which was dated the 26th of July, 1819, stated that the park lands were exonerated from the land tax, and it contained a proviso, that if the plaintiffs should not be able to make out a satisfactory title to the tithes of the premises or any part thereof, the defendant should be at liberty to reject the [*333] *tithes to which the title was defective, and in that event should be entitled to and should accept an abatement out of the purchase money. The 29th of September, 1819, was the period fixed by the agreement for the completion of the purchase.

On the 30th of May, 1820, the plaintiffs obtained the usual

 1823.—*Bosch v. Wood*.

order for a reference to the Master upon the question of title,^(a) and on the 25th of November, following, pending the inquiry as to the title, a receiver was appointed.^(b) The Master, by his report, dated the 19th of July, 1822, certified that the plaintiffs could make a good title to the whole estate, except as to the tithes of about twelve acres, part of the farm lands, but an exception was taken to the report on the part of the defendant. The exception was argued at the Rolls on the 16th and 17th of July, 1823, and one of the objections then made to the title was, that the park lands were not exonerated from the land tax as stated in the agreement. This objection applied only to fifty-seven acres, part of the park lands, which had been allotted under an enclosure Act in respect of rights of common appurtenant to other lands of which the land tax had been previously redeemed, and it appeared from the evidence laid before the Master that no charge had ever been made on account of land tax for the fifty-seven acres in question.

Mr. *Shadwell* and Mr. *Simpkinson* were heard upon the objection for the defendant, and Mr. *Sugden*, Mr. *Preston* and Mr. *Garratt* for the plaintiffs.

In answer to the objection, it was argued that the redemption *of the land tax upon the original estate [*334] cleared the allotment, and the MASTER OF THE ROLLS^(a) declared himself of that opinion, and overruled the objection, observing that when a party redeemed the land tax, he redeemed it for the land and the right of common, and that if when the right of common was set out the land tax attached upon the allotment, the party would be paying double. The defendant having failed in substantiating any of his objections to the title, the exception was ultimately overruled, and the report having been confirmed, a motion was made before the Vice-Chancellor, on the part of the plaintiffs, that the defendant might be ordered to pay his purchase money into court, that it might be referred

(a) 1 Jac. and Walk. 419.

(a) Sir Thomas Plumer.

(b) 2 *Ibid* 236.

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to the Master to inquire what abatement ought to be made in respect of the tithes mentioned in the report, and that the Master might be directed to compute interest on the purchase money, after deducting the abatement from the 29th of September, 1819.

Upon the hearing of this motion, on the 25th of July, 1823, an order was made that it should be referred to the Master to inquire what abatement ought to be allowed to the defendant out of the purchase money, in respect of the tithes mentioned in the report, and that the Master should deduct from the purchase money the abatement which he should find ought to be allowed in respect of the said tithes, and should compute interest on the remainder of the purchase money (after deducting the abatement), from the 29th of September, 1822, down to the time when the conveyances of the estate should be executed to the defendant;

that the receiver should pass his accounts, and should [*335] pay to or receive from the plaintiffs what should *be

found due in respect of his receivership down to the 29th of September, 1822, and should pay to or receive from the defendant what should be found due in respect of his receivership from the 29th of September, 1822, to the time when he should deliver up possession of the estate as thereafter directed; that all proper parties should join in and execute proper conveyances of the estate to the defendant, or as he should direct, and that the conveyances should be settled by the Master in case the parties should differ about the same; that upon the execution of the conveyances and delivery thereof to the defendant, together with such title deeds, documents and papers of or relating to the estate, as the defendant was entitled to require, the defendant should pay to the plaintiffs the remainder of the purchase money, after such deduction as aforesaid, with such interest thereon as should be computed by the Master, and that upon such payment being made, the receiver should deliver up possession of the estate to the defendant.

In pursuance of this order the receiver's accounts were left in the Master's office, and an estimate was made on the part of the

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plaintiffs, by which it appeared that the tithes to which a good title had not been made were of the value of 29*l.* only. On the 18th of September, 1823, before any further proceedings were had under the order, the defendant, who was an officer in the service of the East India Company, addressed a letter to the directors of that company, soliciting permission to return to India on his private affairs, and in consequence of that letter the plaintiffs applied by petition to the Master of the Rolls, for a writ of *ne exeat regno* to restrain the defendant from leaving the kingdom. The petition was supported by an affidavit of one of the plaintiffs, stating that the deponent had lately discovered and believed the fact to be that the defendant was about to depart immediately from this country and to proceed to India, that the purchase money *would be in danger of being [*336] lost to the plaintiffs thereby, and that the object of the defendant in leaving the kingdom was, as the deponent believed, to avoid performing the contract, and carrying the order of the 25th of July, 1823, into execution, and that the defendant had not taken any steps towards performing the said contract or executing the said order.

Upon the hearing of this petition, on the 4th of October, 1823, the Master of the Rolls ordered that a writ of *ne exeat regno* should issue against the defendant, and should be marked for security in 36,000*l.*, and the writ having issued accordingly, the defendant was arrested upon it. After he had been taken into custody, the defendant tendered to the sheriff, as a security for his answering the exigency of the writ, the bond of himself and two sureties in the sum of 36,000*l.*, and a deposit of that sum in the Bank of England in the joint names of the sheriff and the sureties. The sheriff however declined to accept the security tendered, and though in the first instance he had proposed to release the defendant out of custody upon his finding four sureties, in the sum of 36,000*l.* each, that he would not go or attempt to go beyond the seas without the leave of the court, he ultimately insisted that the 36,000*l.* should be paid into his hands before the defendant was discharged.

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The defendant then presented a petition to the Master of the Rolls, praying that his Honor's order of the 4th of October, 1823, and the writ of *ne exeat regno* issued in pursuance thereof might be discharged. By his affidavit in support of this petition the defendant stated, that he had not yet received any answer to his application to the court of directors for leave to return to India, that there was nothing whatever of secrecy or concealment, nor any intention of secrecy or concealment, in his said application, or in his desire and intention to [*337] return to Bengal; and that if the leave asked for should be granted further time must elapse, in the usual course of proceeding in such matters, before he could proceed to the East Indies, and he must state to the court of directors the name of the ship in which he was to go passenger, and obtain an order to be received on board such ship. The defendant further stated, by his affidavit, that he never in any manner contemplated a departure from this country for the purpose or with a view to avoid performing his said contract, and he denied that the purchase money contracted to be paid by him for the estate in question would, by reason of his returning to the East Indies, be in any danger whatever of being lost, he, the defendant, having ample means both in this country and in the East Indies to enable him to pay such purchase money.

The MASTER OF THE ROLLS having refused to make any order on the last-mentioned petition, the defendant paid the 36,000*l.* into the hands of the sheriff, and was thereupon discharged out of custody.

A motion was now made before the Lord Chancellor, on the part of the defendant, by which, in addition to the relief sought by the petition to the Master of the Rolls, it was prayed that the sheriff might be ordered to pay back to the defendant the 36,000*l.* paid to him under or by virtue of the aforesaid writ.

Mr. Wetherell, Mr. Shadwell and Mr. Simpkinson in support of the motion:—To induce the court to grant the writ of *ne exeat regno* there must be an equitable debt actually due from the

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party against whom the writ is demanded, and, though it is not necessary to aver that the party is going abroad for the purpose of avoiding the payment of the debt, the *inten- [*338] tion to go abroad and danger of losing the debt arising from the absence of the party must always be brought forward. *De Carriere v. De Calonne*, (a) *Cock v. Ravie*, (b) *Elches v. Lance*, (c) *Tomlinson v. Harrison*. (d) There is now no debt due from the defendant. There has been no final order to pay the purchase money. A deduction is to be made in respect of the tithes, and the money is to be paid only upon the plaintiffs performing an act which it does not yet appear that they are able to perform. It cannot be contended that because a conveyance may be executed, the estate is so far the property of the defendant as to give the plaintiffs an immediate right to the money. The circumstances disclosed by the affidavits are not sufficient to justify the court in inferring that the debt will be endangered by the defendant's leaving the kingdom. The danger to the debt depends mainly upon the question whether the party going abroad may not leave property here to answer the demand upon which the court can lay its hands. The case referred to in the note to *Goodwin v. Clarke* (e) shows the opinion of Lord Thurlow that in cases of this description the court ought to enter into the question whether property may not be left in England to pay the debt.

THE LORD CHANCELLOR:—I think Dickens must have misunderstood Lord Thurlow in that case, because the writ is granted with analogy to bail at law, and at law you never ask whether a man has property or not, but you make him give bail, leaving it to the bail to inquire whether he has property to indemnify them. Besides, though there may be property to answer a sequestration now, how is the court to know that there *will be property to answer it when the sequestra- [*339] tion issues.

(a) 4 Ves. 577.

(b) 6 Ves. 283.

(c) 7 Ves. 417.

(d) 8 Ves. 32.

(e) 2 Dick. 497.

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For the motion: It must be recollected that the property sold is a security for the purchase money. The court, by its receiver, has the estate in its own hands to make good any loss which the plaintiffs might otherwise sustain by the non-performance of the agreement. The absence of authorities affords a strong argument against the writ being supported. *Goodwin v. Clarke* and *Raynes v. Wyse*(a) are the only cases in which the writ has been granted against purchasers in suits for specific performance. In *Goodwin v. Clarke* the writ was marked in a small portion of the purchase money only; and in *Raynes v. Wyse* the general question whether the writ ought to be issued against a purchaser does not appear to have been discussed. The circumstance of the estate being in the possession of the plaintiffs, by their receiver, distinguishes this case from *Raynes v. Wyse*, where the purchaser was in possession.

THE LORD CHANCELLOR:—It strikes me at present that the writ in *Goodwin v. Clarke* ought to have been granted for the whole amount of the purchase money, or ought not to have been granted at all. There is one great difference between that case and the present. According to the statement of that order there was nothing upon which the court proceeded but the affidavit of the plaintiff, whereas in the present case the court has its own proceedings to act upon. The receiver in this case is in possession, because the defendant ought to have taken possession and would not do so.

[*340] *For the motion: The writ ought not to have been marked in the full amount of the purchase money, the defendant being entitled to a compensation, and the plaintiffs having the security of the estate and of the defendant's other property. To authorize the issuing of the writ it is not sufficient to impute to a party a future distant intention to go abroad, as such an intention can produce no danger to the debt. It ought to be shown that the party means to leave the kingdom immedi-

(a) 2 Meriv. 472.

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ately. No answer has yet been given to the defendant's application for leave to return to India, and if such leave should be given, considerable time must elapse, according to the custom of the East India Company, before the defendant can regularly leave England. There is no rule laid down by which the security to be taken by the sheriff is limited, but his conduct has been oppressive in demanding such excessive bail.

THE LORD CHANCELLOR:—I remember a case in which the sheriff having taken bail on a writ of *ne exeat regno*, and assigned the bail bond to the plaintiff in the suit in equity, application was made to the court for leave to sue upon the bond, and Lord Thurlow held that he had nothing to do with the bond, and that the only order he could make was upon the sheriff to produce the body of the defendant.^(a) It is, therefore, with the sheriff to take care that he has the defendant to produce. According to that decision, I apprehend that what the sheriff does in the case of a writ of *ne exeat regno* is upon his own responsibility. What the sheriff has done in this case is to require sufficient security for his having the defendant to produce.

*Mr. Hart, Mr. Sugden and Mr. Preston, against the [*341] motion:—Where the court appoints a receiver in cases of this description, the question to which party the possession of the receiver is to be attributed is left open to future determination. In this case the court has declared the possession of the receiver to have been the possession of the purchaser from the 29th of September, 1822. From that time, therefore, the purchaser has been bound to pay the purchase money and interest. The court has directed the payment to be made, and there has been nothing to delay it except the defendant not having tendered a conveyance. There can be no doubt, therefore, that the debt was sufficient to authorize the issuing of the writ. The purchaser being in possession by his receiver, this case falls strictly within the authority of *Raynes v. Wyse*, which is a positive decision that

(a) *Collinridge v. Mount*, 2 Dick. 688.

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after it has been shown that the plaintiff is entitled to a specific performance the writ may issue. In the case before Lord Thurlow it did not appear that a good title could be made, and it would therefore have been premature in the court to have considered the purchaser liable for the purchase money. There is no case in which it has been required to be shown that the party is going abroad immediately. Where the intention to go abroad is clear the court will not measure the time. If the application had been delayed and the defendant had prepared for the voyage, the court would have refused the writ on that ground alone.^(a) The cases of *Atkinson v. Leonard*^(b) and *Stewart v. Graham*^(c) have established, that for the purpose of obtaining and sustaining this writ, it is not necessary to swear that the party is about to leave the kingdom with a view to avoid payment of the debt, but that it is sufficient to prove that the party is about [*342] to leave the kingdom, and that the debt will be endangered if he does.

THE LORD CHANCELLOR:—I remember an instance of the writ being issued in an early stage of a cause, upon the defendant's stating that if the plaintiffs obtained a decree he would leave the kingdom.

For the plaintiffs: It does not follow that because the defendant is opulent the debt will not be endangered by his absence. The moment the equitable debtor is about to quit the country without paying the debt, the court raises an implication that by his going out of the jurisdiction the debt will be in danger of being lost.

Mr. Wakefield, for the sheriff.

Mr. Wetherell, in reply, contended that there was no sufficient equitable debt to be the subject of a writ of *ne exeat regno*, and

(a) *Dick v. Swinton*, 1 Ves. & Bea. 371.

(b) 3 B. C. C. 218.

(c) 19 Ves. 313.

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remarked, that the case of *Raynes v. Wyse* only suggested the question whether the writ had ever issued till it had been shown that the plaintiff was entitled to a specific performance, and did not decide that it ought then to issue.

THE LORD CHANCELLOR:—The question before me is whether this writ ought to be discharged. If it ought never to have been granted it ought now to be discharged. There can be no objection to the writ being discharged if the 36,000*l.* is brought into court, but if the writ ought not to have been granted, there is no pretence for bringing the money into court. It *does not appear to me that in determining the present [*343] question, I have anything to do with the complaint made as to the conduct of the sheriff. It must be recollected that he is placed in circumstances of great difficulty; that it is upon his own responsibility he is to act. After Lord Thurlow's decision that he would put it upon the sheriff to produce the defendant to the court, the sheriff is not to be blamed if he takes care to have the defendant to produce. This case originally came before the Master of the Rolls, who, according to all which is to be found in the books, has as much jurisdiction to direct the writ to issue as the Lord Chancellor himself has, though it is by the Lord Chancellor that the seal must be put to the writ, and till that has been done, according to the order of the court, there is nothing which can be denominated a writ. If a serious doubt had arisen in my mind, I should have referred the case back to the Master of the Rolls before I put the seal to the writ. This writ till a late period of our history was a high prerogative writ which was made use of for the purposes of the state; it was a writ by which the crown was enabled to prevent any of its subjects from leaving this country when their services were required in it. The effects of the writ are as much known to the law at the present moment as they ever have been. Upon what grounds the writ was originally applied to civil purposes, whether upon the principle that no better service could be done to the state than to compel the subjects to do justice to each other, it is difficult now to determine; but, whatever the principle may

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have been, it is without all question that this court, if not bound *ex debito justitiæ* (and I do not say that it is so bound), is bound in the exercise of a sound discretion to grant the writ, if the case be a case in which the writ ought to be granted. There are certain circumstances attending the application for the writ which admit of no dispute. In the first place the debt must [*344] be equitable; in the second place it must be due; *and in the third place it must be a debt in respect of which the court can see its way to direct what sum shall be marked upon the writ. To the rule that the debt must be equitable there is one case of exception, the case of account; that exception stands upon this ground, that this court has jurisdiction in matters of account as well as a court of law, and that the proceedings at law in such matters are attended with very great difficulties. This court has therefore said, though it be a general rule that the debt shall be equitable, and the affidavit as to the amount positive, yet, in matters of account, that shall be considered as an equitable debt which is also a legal debt, and it shall be sufficient for the party to swear to his belief as to the amount of the balance. I take it that these cases of specific performance must fall under the same rule. When it is considered what must be the averments and what must be the proof at law, it cannot be denied that there are many cases of specific performance in which the debt could not at law be recovered. I will venture to say, that if in matters of account and matters of specific performance the jurisdiction of courts of equity was to be destroyed, there would be very many cases in which no remedy at all would be left. The rule that the sum to be marked on the writ must be ascertained has been settled in many cases. In the case of executors, for instance, it must be shown to what amount they have received assets, in order that the court may know for what sum the writ shall be marked. Such being the case with respect to the writ of *ne exeat regno*, the principles of the court require a pledge to be given to the fact that the party is going abroad, and that the debt will be endangered if he does. I am not aware of any case which has determined that it must be sworn that the party is going abroad immediately; that is a circumstance to be

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considered in the exercise of the sound discretion which the court applies to the subject; I do not take it that it need be sworn that the party is going abroad for the *purpose [*345] of avoiding the payment of the debt; if it can be collected that it is the intention of the party to go abroad before the debt can be got out of his hands, it is a case, in which, in the exercise of a sound discretion, the writ ought to issue. *Goodwin v. Clarke* does not at all apply to this case; that was a case in which all that had passed as to the acceptance of the title rested entirely upon the affidavit of the plaintiff in the cause, and, to render that case in the least degree applicable to the present, it must be shown that everything had taken place there before the filing of the bill, which has taken place in this cause since the bill was filed; with all deference to Lord Apsley, that case cannot have been rightly decided; the court was bound to grant that writ for the full amount of the purchase money, or it had no right to grant it at all. Whether the writ ought to be granted merely upon the footing of contract I shall not say one single word, this is not a mere case of contract. I need not state that the contract alone (if it could ultimately be carried into execution) made the estate the property of the defendant, so that he might devise it or do anything with it which the equitable owner of the estate could do, with this difference only, that the estate in his hands was subject to a lien for the purchase money. I do not consider the distinction pointed out in the case before Lord Thurlow, because this is not a case which falls within the reach of Lord Thurlow's objection, unless it falls within the reach of that part of the objection which hints at the purchaser's having other property; this is a case in which the title has been approved, and an order has been made by the court consequent upon the approbation of the title; that order adverts to the circumstance of a receiver having been appointed in the progress of the cause; I take it to be clear that if the defendant is to take the estate the receiver must be considered as his receiver, and the possession of the receiver as his possession.

*When I put the seal to this writ, it did not escape [*346]

1823.—Boehm v. Wood.

my attention that there was an allowance to be made for the tithes of a small portion of the estate, but I satisfied myself that it was impossible to say that less than 36,000*l.* could be due as money to be paid for the property by the purchaser, who was fixed with the obligation to take it by the title being made good; it did not either escape my attention that there was in this case a security in the nature of a lien upon the estate. It happened that I knew the estate to be an estate rather for pleasure than for profit, but that did not govern my mind upon the question whether I should judicially give more or less; I came to the determination that the writ ought to be marked for the full amount of the purchase money, because, considering equitable bail with reference to legal bail, I thought, and I believe I am not wrong, that if instead of the purchaser's tendering a conveyance the vendor had tendered it, and had called upon the purchaser to pay the money and he had refused to do so, and the vendor had brought an action, the purchaser might have been held to bail at law for the whole debt, and it could not have been said that the vendor should not have bail for the whole debt because he had a lien in equity. I also reasoned the case thus: the vendors have got the estate, but that is not what they wish to retain, and how are they to proceed to a sale of the estate if the defendant goes abroad whilst there is a decree in this court that the estate is his in equity; how is that equitable title to be got out of him? It appeared to me that the difficulty attending a resale was such, that even if there had been an analogy to be derived from legal bail in favor of the defendant, it could not have applied under the difficulties which would have presented themselves in this court. When I put the seal to the writ, I was of opinion that the debt was an equitable debt for which the writ might issue, and I did not forget to consider whether the debt was [*347] due; that the debt was due *appeared to me to be the clear result of the Vice-Chancellor's order, because that order in effect declares, that such as the rights of the parties are thereby declared to be, such were the rights of the parties at the time of the bill being filed. Whether the court has done right or wrong in all its doctrines about specific performance, is a

1823.—Boehm v. Wood.

question with which a judge in this court dare not deal. If those doctrines are to be altered, they must be altered by the House of Lords.

Another question in this case is, whether the affidavit is sufficient; it does not appear to be denied that it was sufficient to authorize the writ being granted; I do not say that it is, therefore, sufficient to sustain the writ, but I am ready to say I am not convinced that any such explanation has been given, as to call upon the court to say that with such explanation the writ ought to be discharged. That the defendant meant to go abroad if the East India Company gave him leave, there can be no doubt, and I cannot satisfy myself that in giving leave to persons to go abroad, the East India Company do not so act, as that the defendant might have had an opportunity to go before we met again in this court. It is not stated that any arrangement has been made to pay or any property devoted to the payment of this debt

With respect to the difficulty as to the sum to be marked upon the writ, looking at the proceedings in this cause I should have had no difficulty, if the motion made before the Vice-Chancellor had been made before me, in ordering the defendant to pay the 36,000*l.* into court; I do not, therefore, say that the writ ought to have issued, but I say that all uncertainty as to the sum to be marked upon it is quite done away with by that circumstance. Upon these grounds, it appears to me, that, taking the circumstances of this case as I find them upon this record, without *laying down any general rule, there have not been [*348] laid before me sufficient grounds for discharging this writ.

 1823.—Attorney-General v. Goddard.

ATTORNEY-GENERAL v. GODDARD.

ROLLS.—1823: 11th of November

A testator, after giving a legacy in trust for a charitable purpose, says, "As money is of more uncertain value than land, I do also give them (the trustees) power to make such purchase as they shall think best for perpetuating the gift:" Held, that these words do not bring the legacy within the Mortmain Act.

A testatrix gives a legacy in trust for the minister of a chapel, but directs that, upon a specified contingency, the legacy is to go to the trustees of a certain college; the interest is paid during many years to the minister of the chapel: Held, that the charity for the chapel may be established upon a bill and information to which the trustees of the college are not parties.

MARTHA PYLE, by her will dated the 8th of April, 1783, bequeathed as follows: "I give unto the Rev. Dr. Bolton Simpson and the Rev. James Talman, together with the vicar of Christ Church, Twynham, and to their heirs and successors, 1,000*l.*, which I have now in India annuities, in trust for the benefit of the minister that shall or may be appointed and constantly do weekly duty at the chapel lately built for the tithing of Hinton: (that is to say) if divine service is performed weekly in the said chapel within the space of two years from my death, then my will and desire is that these my trustees to this part of my will, do pay the interest arising from the 1,000*l.* India annuities yearly from the time of divine service being so performed, unto the minister who shall be appointed and do the duty, &c., but until such time as service is regularly and weekly performed, the money arising by way of interest on the said sum of 1,000*l.* India annuities, I give to be distributed equally every half year among the clergymen's widows belonging to the college near Closegate, in the close of the city of New Sarum for the time being: and if the chapel is not actually consecrated and in constant use for divine service within three years at farthest after my decease, then my will and desire is that the money here given should continue the *interest arising therefrom forever unto the widows of the said college, &c.; and in such case of the chapel not being in constant use for divine service in three years

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from my death, &c.,(a) I would be glad to have the same gentlemen, who are trustees for the estate of the said college, take upon them to be trustees for this 1,000*l.* India annuities: lastly, as money is of more uncertain value than land, I do also give them power to make such purchase as they shall think best for perpetuating the gift."

The testatrix died in 1784. Her executor, Gale, up to the time of his death in 1809, paid the dividends of the legacy to the minister of Hinton chapel. Gale's widow and executrix applied them in the same way: but, after her death, Goddard, her executor, refused to make any payments without the direction of the court. In consequence of his refusal, the Attorney-General and Thomas Wyndham, the officiating minister of Hinton chapel, filed the present information and bill; alleging, in addition to the facts already stated, that, before the expiration of the term fixed by the will of the testatrix, the chapel was consecrated, a minister appointed to it, and divine service performed therein regularly every week, and therefore praying that the charitable bequest in trust for the minister of the chapel might be established, that the dividends of the legacy might be decreed to be paid to him, and that proper persons might be appointed to be trustees of the fund along with the vicar of Christ Church, Twynham.

Dr. B. Simpson and Mr. Talman had long been dead. The only defendants were the vicar of Christ Church and Goddard, the personal representative of the original testatrix; *both of whom admitted by their answers, that they [*350] believed that divine service had been regularly performed in Hinton chapel as alleged in the bill.

No evidence was gone into.

(a) In this part of the will, as recited in the brief, there occurred some confused and ungrammatical expressions, amounting to a direction to the trustees for the chapel to relinquish the trust, in the event of the chapel not being in constant use within three years from the death of the testatrix.

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The cause came on as a short cause before the long vacation ; when it was ordered to stand over, in consequence of a doubt which the Master of the Rolls expressed, whether the last clause of the bequest, "Lastly, as money, &c.," did not bring the gift within the Mortmain Acts.

Mr. *Moore* appeared for the executor, Goddard.

Mr. *Merivale* and Mr. *Pemberton*, for the other parties, supported the prayer of the bill and information. Relying on the cases cited in *Roper on Legacies*,^(a) they took the distinction between a direction to trustees to invest money in land, and a discretionary power given them to do so ; and they argued, that such a discretionary power did not bring a legacy within the Mortmain Acts.

The MASTER OF THE ROLLS, admitting the distinction, said that the doubt was, whether the clause in the will did not amount to a direction to the trustees to purchase land as the more permanent security, and whether the discretion given them extended to anything further than the selection of such an estate as would constitute an advantageous investment of the money. Upon the whole, however, considering the leaning of the court in favor of charities, he was of opinion that the present bequest ought to be sustained ; especially as the clause, on which the doubt arose, seemed to relate to an event which had not occurred—the event of the chapel not being in use for divine service within three years after the death of the testatrix.

[*351] *Another difficulty suggested by Mr. *Moore* on the part of the executor, but not insisted upon, was, that the necessary parties were not before the court. If the chapel was not consecrated and in constant use for divine service within three years from the death of the testatrix, the legacy was given over to the trustees of the college of clergymen's widows at Salis-

(a) 2 *Roper on Legacies*, 86.

bury. The trustees ought to be before the court, in order to assert any interest which they might have, and raise the question, whether the contingency, which was to give them an interest, had or had not happened. To establish the charity for Hinton chapel was to declare, that the gift to the college of clergymen's widows did not take effect. How could the court make such a decree, when no person was present to sustain the rights of the college?

The only answer made to this objection was, that, in fact, the contingency, on which the gift to the clergymen's widows arose, had not happened; and that, after the payment of the dividends during so many years by Gale and his executrix to the minister of Hinton chapel, without any claim being advanced by the trustees of the college, it was unnecessary to bring them before the court.(a)

The MASTER OF THE ROLLS thought, that, under the circumstances of the case, the charity for Hinton chapel might *be established in the absence of the trustees of the [*352] college.

The decree was made accordingly, without any reference to the Master to inquire whether the chapel had been consecrated and in regular use for divine service within the time prescribed by the will of the testatrix. The only reference was, to appoint proper trustees.

(a) The objection was—not that the contingency, which gave an interest to the trustees of the college, had happened, but, that evidence was given that it had not happened, and that the question whether it had or had not happened, could not be determined in the absence of the trustees.

Besides, even if the right of the minister of Hinton chapel was established, the trustees of the college had an interest in ascertaining the precise date when service began to be performed regularly in Hinton chapel: for the college was entitled to the dividends during any interval that might have elapsed between the death of the testatrix and the time when the chapel began to be in regular use.

 1823.—Verlander v. Codd.

VERLANDER v. CODD.

ROLLS.—1823: 11th November.

The person entitled to the reversion in fee of a house, expectant upon a term vested in a lessee who has demised the premises for a portion of his term to a sub-lessee, agrees by one letter to grant that sub-lessee an extension of lease at a certain yearly rent, and, in another letter, fixes the time when the term which he thus proposes to grant, is to expire; this is a valid agreement within the Statute of Frauds, and, under it, the sub-lessee has a right to a lease which shall commence from the expiration of the existing term.

GEORGE AINGE and William Ainge being possessed as the executors of Ann Hovell, of a leasehold messuage for a term which was to expire at Michaelmas, 1826, at a reserved rent of 36*l.* a year, demised it, by indenture dated the 10th November, 1818, at a yearly rent of 50*l.* to Jacob Alexander Verlander, for a term of seven years and three quarters, wanting ten days, to commence from the 5th December, 1818. In the same month of November, a treaty was commenced between Verlander and Philip Codd, who, in 1814, had purchased the fee simple of the house, subject to the term of the Ainges, for a new lease of the premises, and also for a lease of an adjoining larger house. In the course of this negotiation, Codd, on the 28th of November, 1818, wrote the following letter to Verlander:

“I have received an offer for the large house on the terrace so much more to my advantage than that you made me, that I have closed therewith. I will, however, grant you the [*858] extension of lease you solicit on the small *one, on your entering into the regular arrangements for paying me 50*l.* a year for the same.

“ P. CODD.”

After this, Verlander let the house, and some money was expended by the new tenant in putting it into repair. Towards the end of July, 1819, Verlander informed Codd, that he should give his solicitor directions to prepare a lease: in consequence

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of which notification Codd, on the 2d of August, wrote and signed a letter, addressed to Verlander, containing the following passage:

“As I know my own solicitors, Messrs. Still, Strong and Rackham, to be friendly, very reasonable and correct, I shall feel more gratified if they have the drawing out of the lease which I am now to grant to you for such term of years as to cause the expiring of it to cease, on the day on which that does which I granted to Mr. Cullingham.”

The lease to Mr. Cullingham, mentioned here, was a lease of the adjoining house, and would expire at midsummer, 1840.

In compliance with Codd's request, Verlander carried the two letters and his own lease from the Ainges, to Messrs. Still, Strong and Rackham, as instructions for preparing the new indenture of demise: and they, without having received any further instructions from, or having had any subsequent communication with their client, prepared a lease and counterpart, which purported to demise the premises to Verlander for a term of fourteen years from the 24th of June, 1826, at a yearly rent of 50*l*. On the 9th of August, they requested him to meet Mr. Codd at their chambers, on the 11th, for the purpose of having the lease and counterpart executed. Accordingly, Verlander went to their chambers at the appointed time, and, *in their pre- [*354] sence, executed the counterpart. Codd did not attend: and, when afterwards called upon to execute the lease, refused to do so, on the ground that the only agreement which he had made, was to grant a lease ending at midsummer, 1840, and yielding to him a yearly rent of 50*l*. from midsummer, 1819.

The bill was filed by Verlander against Codd for a specific performance of the contract. It prayed in the alternative, either the defendant might execute and deliver the lease prepared by Messrs. Still, Strong and Rackham; or, if it should appear to the court, that the true meaning of the agreement was, that the

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defendant should receive a rent of 50*l.* for the premises, instead of the original rent of 36*l.* a year, then that the agreement might be specifically performed according to that construction.

The defendant, by his answer, insisted on the benefit of the Statute of Frauds; and contended, that if there was a valid agreement in writing, the true meaning of it was, that the subsisting lease should be surrendered, and that the plaintiff should have a lease from midsummer, 1819, to midsummer, 1840, at a yearly rent of 50*l.*

Mr. *Horne* and Mr. *Wakefield* for the plaintiff.

Mr. *Shadwell* and Mr. *Bligh*, for the defendant:—It is not enough that one party understood the contract in a particular sense: the contract is the understanding and agreement of both parties; and that agreement must be found expressed with sufficient certainty in writing signed by the defendant. The plaintiff relies on the words, "I will grant you the extension of lease you solicit:" but these are too indefinite to be enforced by a court of equity. What was the proposed extension? what lease [*355] was it which was thus to be extended? What was *the subject of this lease and extension? To fix these points it would be necessary to have recourse to parol evidence. The letter of the 2d of August may show, by reference, when the proposed extension was to cease; but the date from which it was to commence is left altogether uncertain: so that the agreement is defective in that particular which is the most essential of all.

As to the real intention of the defendant, there can scarcely be a doubt. It is not likely that he should bind himself, without deriving any present benefit from the transaction, to grant a reversionary lease of his property, to take effect after a lapse of eight years.

THE MASTER OF THE ROLLS:—In November, 1818, when the transaction in question took place, *Verlander* was in possession

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of the house, at a rent of 50*l.* a year, under a demise from the Messrs. Ainge, who, as the personal representatives of Ann Howell, were themselves lessees of it at a yearly rent of 36*l.*, and had a remnant of the original term still vested in them. It is not pretended, that anything was done or said, to alter or put an end to either the contract between them and the reversioner, or the contract between them and their sub-lessee: and, therefore, the new contract between Verlander and Codd must have been one that was to be consistent with the distinct and independent contract subsisting with the Ainges. Their interest could not be affected, unless by dealings to which they were parties. There was no communication with them upon the subject. As Codd had purchased the reversion only four years previously, and in the interval had received the rent from the Ainges, he must have known that they were his tenants—that, during the continuance of their term, he was entitled to no more than 36*l.* a year—and that Verlander *had no right or power to [*356] give up a lease which was not his. How, then, is it possible to believe the defence which is set up—namely, that there was either a mutual understanding, or a positive agreement, that the lease of the Ainges should be surrendered?

Under these circumstances, and with a full knowledge of the relative situation of the Ainges, of Verlander, and of himself, Codd writes the letters of the 28th of November, 1818, and the 2d of August, 1819. "I will grant you," says he in the former, "the extension of lease on the small house on your entering into regular arrangements for paying me 50*l.* a year for the same." Could Verlander have solicited, could Codd have effectually granted, anything which was inconsistent with the contract subsisting with the Ainges? The phrase "*extension of lease*," used by a person who knew the actual situation of the property and the interests of the different parties in it, is quite free from ambiguity. It must refer to the end of the term granted by the subsisting lease. The word "*extension*" implies *ex vi termini* the continuance of the lease and negatives the destruction of it: it

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denotes—not that the lease is to be surrendered, but that something is to be added to it.

On the 2d of August, 1819, the second letter is written; and it is scarcely to be supposed, that, during the whole of the period that had elapsed from the 28th of the preceding November, the parties had failed to understand each other. That letter fixes the termination of the new lease: it is to expire at midsummer, 1840. But its commencement, says the defendant, is left uncertain. In no respect: for the former letter had stated, that the new lease was to be an extension of the existing lease; and the existing lease expired in 1826. The defendant, therefore, had agreed to grant to the plaintiff a lease, which should en-
[*357] title him to *the possession of the house from the expiration of the term vested in the Ainges until midsummer, 1826, at a yearly rent of 50*l*.

It has been contended that it is extremely improbable that Codd should have meant, without any present benefit, to grant a reversionary lease, commencing at the end of eight years. That depends entirely on the notions which he entertained with respect to the likelihood of property of this description rising or falling in the meantime. To secure a rent of 50*l*. a year, from 1826 to 1840, might be, and might by him be conceived to be, very advantageous.

It has been determined that one written paper, which is signed, may refer to another which is not signed.^(a) Here all the essential terms of the contract are contained in the two letters signed by the defendant, explained by the lease to which they refer. The plaintiff is, therefore, entitled to a decree for specific performance, with costs.

The decree was, “that the defendant do execute the lease pre-

(a) 9 Ves. jun. 250; 1 Scho. & Lef. 22. *Tauney v. Crowther*, 3 Bro. C. C. 161, 318.

1823.—*Dines v. Scott*.

pared by the defendant's solicitors, Messrs. Still, Strong and Rackham, in the pleadings mentioned, and do pay unto the plaintiff his costs of this suit."—Reg. Lib. 1823, B. 107–108.

*DINES v. SCOTT.

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1823: 23d July and 13th November.

Where a sum of money came to the hands of one of two executors, who paid it over to the other executor, it was held that the executor who first received it could not, under the usual decree for an account, examine the other executor as a witness to prove that the money paid over was duly applied on account of the affairs of the testator, and an order obtained for that purpose was discharged.

By the decree made on the hearing of this cause, dated the 15th of May, 1821, it was, amongst other things, ordered that it should be referred to the Master to take an account of the personal estate of John Wintersgill Piercey, the testator in the pleadings named, come to the hands of his executors, John Corderoy, deceased, and the defendant Mary Scott, and it was ordered, that what upon taking the said accounts should be found due from the said John Corderoy should be answered by the defendants James, Stanbank and Green, his executors, out of his assets.

In the progress of the cause in the Master's office, the defendants James, Stanbank and Green, having been charged with moneys received by Corderoy on account of the estate of Piercey, carried in their discharge, by which, amongst other payments, they claimed to be allowed several sums of money alleged to have been advanced by Corderoy to the defendant, Mary Scott, for the purpose of enabling her to discharge debts due from the estate of Piercey. The plaintiffs having objected to the allowance of these sums, unless the due application of them was proved by the production of vouchers, a motion was made before the Vice-Chancellor, on behalf of the defendants,

1823.—*Dineen v. Scott*.

James, Stanbank and Green, that they might be at liberty to examine the defendant, Mary Scott, upon interrogatories before the Master, touching the payments made by her on account of Piercey's estate, and the moneys received from her co-executor, the late John Corderoy, for the purpose of making such payments.

[*359] *The motion was supported by the affidavit of the defendant Green, which, after stating that the deponent and his co-executors were unable to produce the vouchers to prove the due application of the sums mentioned in their discharge to have been paid to the defendant, Mary Scott, and that the defendant, Mary Scott, alleged that those vouchers were delivered up to Corderoy, and after further stating that if any such vouchers were so delivered up, the same were, as the deponent believed, after the death of Corderoy, destroyed by the defendant James, who had burnt various papers which he conceived to be useless, went on to state that the payments in question were taken from an account rendered to the defendant Mary Scott by Corderoy, in his lifetime,^(a) and that Mary Scott would, as the deponent believed, if she was examined, admit that such account was correct, and that she received and applied the money as there stated, and that although twenty years had elapsed since the payments mentioned in the discharge of the deponent and his co-executors were made, they had been enabled, in those instances where the names of the persons had been given in the before-mentioned account, to show that those persons had actually received the sums alleged to have been paid to them, but that nothing appeared upon the said account with respect to the parties to whom the sums in question were paid, and the deponent and his co-executors were unable to discover the names of such parties.

Upon this affidavit the Vice-Chancellor made the order, as prayed by the notice of motion, saving all just exceptions.

(a) By the decree in the cause it appears that Mary Scott was tenant for life of the residue of the testator's estate.

1878.—*Dineen v. Scott*.

A motion was now made before the Lord Chancellor, on the part of the plaintiffs, to discharge the order.

*Mr. *Hart* and Mr. *Barber*, in support of the motion, [*360] contended that the order sought to be discharged was altogether new in practice, and furnished a most dangerous precedent, as it would enable executors in all similar cases to settle disputes between themselves at the expense of their testator's estate.

Mr. *Pemberton*, against the motion, insisted that the sums in question having been paid to Mrs. *Scott*, for the purpose of being applied by her, as the agent of *Corderoy*, the court would permit her to be examined for the purpose of proving the due application of those sums, and that she might have been examined as of course before the decree. He also relied upon the circumstances stated in the affidavit, and particularly the length of time which had elapsed since the payments in question were made.

THE LORD CHANCELLOR:—If executors or accounting parties have been led to divest themselves of all accounts, the course of the court is not to permit one to examine the other, but to allow the party charged to discharge himself upon his own oath. Where an executor is permitted to discharge himself upon his own oath, he cannot discharge himself without discharging his co-executor; because, if he proves the due application of the money by himself, he proves the due application of it against all the world. *Prima facie* it is much more safe to abide by the rule of the court that a proper case being made out the court will allow an executor to discharge himself upon his own oath, than it is to say that the court will allow co-executors to be carrying on suits between themselves.

Nov. 17th.—THE LORD CHANCELLOR:—In this case a sum of money came to the hands of one *of two executors, [*361] and it is alleged that he paid it over to the other executor.

 1823.—Parker v. Fairlie.

The consequence of that allegation is that both became answerable for that sum, and then the question is, whether the one who first received it, being charged with that sum, can examine the other, who is also chargeable with it, as the witness to prove that it was duly applied on account of the affairs of the testator; whether the examination of one personal representative is to discharge another personal representative, where by that examination the party examined would discharge himself also. This order cannot stand. There have been many cases where, upon the hearing of a cause, the court has declared that, in the circumstances under which the bill has been filed, it would apply a different rule of proof from that which is ordinarily applied, and I take it also that, upon a proper case laid before it, the court may do that under other special circumstances; but then there must be a proper case laid before the court and discussed in the presence of all the parties interested. In this case there is nothing before me to show that it is out of the power of Mrs. Scott to prove the due application of these sums by the individuals to whom they were paid.

Order discharged.

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*PARKER v. FAIRLIE.

1823: 10th July; 12th, 14th and 16th November.

Upon a bill filed by merchants in England against merchants in India, for an account of the dealings and transactions between them, one of the defendants, residing in England, in answer to an allegation in the bill that some cotton which had been sent by the defendants to the plaintiffs was of inferior quality, said, that he had no personal knowledge of the dealings between the two firms, but that he had received certain affidavits and certificates, which his partners in India had caused to be made by experienced persons there, from which he believed the cotton to be of superior quality, and set forth the affidavits of certificates, in a schedule, *in hæc verba*: held that the schedule was not impertinent.

THIS case came before the court upon a petition of appeal, presented by the plaintiffs, from the decision of his Honor the Vice-Chancellor that the second schedule to the answer of the defendant Fairley was not impertinent. The schedule in ques-

 1823.—*Parker v. Fairlie*.

tion consisted of about thirty folios. The facts of the case are fully stated in the report of the hearing before the Vice-Chancellor, 1 Sim. & Stu. 295.

Mr. *Horne* and Mr. *Palmer*, for the appellants, contended that the documents contained in the schedule could never be made use of in evidence, and might have been made part of the answer by simply referring to them; that it was, therefore, unnecessary and useless to set them forth at length in the answer, and that a statement which was unnecessary and useless must be considered to be impertinent. *Alsager v. Johnson*,^(a) *Norway v. Rowe*.^(b)

Mr. *Shadwell* and Mr. *Grant* for the respondents:—The cases which have been decided do not bear upon the present question; they were determined upon the ground that the length of the statements upon the record was immoderate and oppressive; there is no rule of the court requiring answers to be framed in the most concise form; a defendant is entitled to state every circumstance *which verifies and gives weight to [*363] his answer, and the documents contained in the schedule materially confirm the statement made by this defendant.

THE LORD CHANCELLOR:—The court is bound to protect plaintiffs from unnecessary expense, but while it exercises that providence for the benefit of plaintiffs, it must take care that it does not, as an illiberal view of the subject may do, prevent defendants from stating their cases in such a manner as may be necessary for their defence. I should be very unwilling to press this defendant so far as to say that the schedule in question is to be considered impertinent merely because the matters contained in it would not be evidence. It may become necessary in the result of this case that a commission should go out for the examination of some persons in India, and I think, therefore, the defendant could not have been blamed, if he had said in his answer that he had in his possession certain documents which tended to prove certain matters, and had referred to a schedule containing a catalogue of those documents; but I find it ex-

(a) 4 Ves. 217.

(b) 1 Mer. 347.

1823.—*Parker v. Fairlie*.

tremely difficult to say that there are not matters contained in this schedule which have no relation at all to the matters in question in the suit, and I also find it difficult to say, that the matters contained in the schedule, which have relation to the matters in question in the suit, are properly set forth.

November 12th.—The LORD CHANCELLOR said, that he concurred in opinion with the Vice-Chancellor and the Master, that the defendant was justified in referring to the affidavits and certificates as forming the ground of his belief, and as aiding him in crediting and giving weight to that belief, and observed that the Vice-Chancellor's judgment introduced a question of considerable importance, whether a statement, which is not necessary, but still is relevant, is *within the intent and meaning of the court impertinent, that is to say, whether if a man says more than is necessary for him to say, but not a word more than is relevant, so much as is not necessary is to be deemed impertinent. His Lordship then made the following observations. If the defendant in the body of his answer had referred to these affidavits and certificates, leaving them in the hands of his clerk in court to be inspected by the plaintiffs in case they should think proper to inspect them, or leaving them to be called for by the court in case the court should think proper to call for them, it is quite clear that the answer would have been sufficient. The defendant, however, has not referred to the affidavits and certificates as capable of being seen in the hands of his clerk in court, or as capable of being called for by the court, but has stated the affidavits and certificates themselves, and his Honor the Vice-Chancellor is of opinion that this is not useless, that the credit which is due to the answer, depends upon the circumstances stated in the affidavits and certificates, and that the defendant, therefore, has a right to make the affidavits and certificates themselves, so evidencing the truth of his answer, part of his answer; I apprehend that, according to the practice of the court, if the affidavits and certificates had been referred to in proper terms, they would in truth, by virtue of that reference, have been part of the answer, and that as part of the an-

 1823.—*Parker v. Fairlie*.

swer, the plaintiffs might have compelled the production of them, and the defendant would have had a right to have them produced. This case, therefore, brings the question fairly before the court, whether the term impertinent can be applied to that which is relevant, but which is not necessary to be set forth. There have I believe been some cases in which the court has held it to be impertinent, where accounts of personal estate have been required, to set forth all the particular articles of which the personal estate was composed, and where accounts of receipts and payments have been required, to set forth the different items *and the different particulars of the sums [*365] which formed the aggregate amount of the account demanded; (a) yet it cannot be denied that the answers in those cases were in a sense relevant, and it must, therefore, have been the non-necessity of entering into particulars which induced the court to determine that the answers were impertinent. I think the court would have taken a better course if it had said originally, this is not impertinent, but, because it is useless, the defendant shall pay all the costs attending it.

November 14th.—The LORD CHANCELLOR said he believed it would be found impossible to hold that the answer in this case was not impertinent without running foul of some decisions to the contrary.

November 15th.—THE LORD CHANCELLOR :—There is one view of this case which has struck me as very material; in a court of equity a plaintiff reads as much of the answer of a defendant as he thinks proper; but suppose a case in which a plaintiff may come into equity and the defendant may turn plaintiff at law, or in which a plaintiff in equity may dismiss his own bill and himself become plaintiff at law; if the defendant's answer is to be made use of at law must not the whole be read? Is it not therefore a very material consideration whether, although it was not absolutely necessary for the defendant to set out these affidavits

(a) *Beaumont v. Beaumont*, 5 Madd. Rep. 51; *Norway v. Rowe*, 1 Mer. 347.

 1823.—*Parken v. Whitby.*

and certificates, and he might if he had thought proper have referred to them, he had not a right to put them upon his answer if he thought fit to do so, because, if the answer should be made use of against him in a court of law, it might be impossible for him to make use of the affidavits and certificates unless [*366] *they were set out. This particular reason leads me to think that in this case the answer is not impertinent.

The counsel for the appellants then suggested that the defendant would have been entitled to read the documents at law if he had merely referred to them, and again adverted to the objection that the documents could not be made use of in evidence; but the Lord Chancellor said, that the defendant, in order to read the documents at law, must not only have referred to them in the answer, but must be quite sure that they would be safely kept, and that if the documents were in the answer, he apprehended that they must be read at law, subject to the observation of the court as to the weight which was due to them; that the Vice-Chancellor's judgment must be affirmed without prejudice to any question as to costs, and that the application for costs could only be made at the hearing of the cause.

Appeal dismissed.

PARKEN v. WHITBY.—WHITBY v. PARKEN.

ROLLS.—1823: 13th and 17th November.

If, in the course of proceedings in a suit for specific performance, there comes out a fact, not put in issue in the cause by either party, which affects the legality of the contract, or tends to show that the contract is not fully stated in the bill, the court will direct an inquiry into the fact so disclosed.

Specific performance will not be decreed of an agreement to sell certain property at a price to be settled by two persons who are named, if the court sees reason to believe, that the price, subsequently fixed by these persons, is considerably below the real value of the property.

A person, who admits that he conceives himself bound in honor, though not legally bound, to contribute to the expenses of a party in a suit, is a competent witness for that party.

1823.—*Parken v. Whitby.*

On the 2d of February, 1816, Whitby signed an agreement to sell all his lands to Parken, at a price *to be [*367] fixed by two indifferent persons; shortly afterwards Parken named one Franklin to act in the proposed valuation on his behalf; and Whitby, at the recommendation of Parken's solicitor, appointed Olley to be his valuer.

The agreement of the 2d of February, not having been carried into execution, another agreement was signed, dated the 20th of February, 1817, by which Whitby contracted to assign and convey to Parken all his lands, farming stock, furniture, china, books, &c., for such price or prices as the same should be valued at by Olley and Franklin. These gentlemen on the same day fixed the price of all the articles included in the contract at 1864*l.* 14*s.*

By the original bill Parken prayed a specific performance of the agreements of the 2d of February, 1816, and the 20th of February, 1817. Whitby, by his answer, and also by a cross bill, insisted, that the valuation had been made unfairly, and that the agreements having been obtained by fraud, ought to be declared void.

Mr. *Shadwell* and Mr. *Roupell* were for the plaintiff in the original suit, and defendant in the cross suit:

Mr. *Sugden* and Mr. *Roots* were for the defendant in the original suit, and plaintiff in the cross suit.

The agreement was clearly proved; and the defendant endeavored to protect himself from the performance of it by showing that the transaction presented many features, which, to say the least, were of a highly suspicious character. The points on which he principally relied, were these two:

First, Parker in his answer to the cross bill, set forth an account, which his solicitor, in August, 1817, had delivered

 1823.—*Parken v. Whitby.*

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Appeal dismissed.

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ROLLS.—1823: 13th and 17th November.

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Appeal dismissed.

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 1822.—*Parken v. Whitby.*

[*368] on his behalf to Whitby. It contained the following items:

By amount of valuation on purchase of remainder of Whitby's estate and goods	1,364 <i>l.</i> 14 <i>s.</i>
Deduct for goods abstracted and retained by Mr. Whitby from the property comprised in the above mentioned valuation	79 <i>l.</i> 2 <i>s.</i>

Burleigh, Parken's solicitor, was examined in the cross suit as a witness for Parken: and, in reply to the last and general interrogatory, he stated that, when he was instructed to prepare the contract and to comprise in it all the household furniture, plate, linen, china and books of Whitby, it was verbally agreed by the parties, that Parken should not take the household furniture, &c., unless Whitby should be convicted on some informations under the game laws, which were then in prosecution against him—that Whitby was not convicted on these informations—and that, for that reason, the household furniture, plate, linen, china and books had been retained by him.

From these circumstances, said the defendant in the original suit, it was evident that the written agreement did not express the real contract between the parties, but was in fact intended to be a fraud upon the game laws. The written agreement not being the true agreement, it could not be executed *in toto*: neither could it be executed in part; for the valuation was a gross sum of 1,364*l.* 14*s.*, which could not now be apportioned among the different items included in the estimate.

Secondly, There was strong evidence, that the price fixed by Franklin and Olley was far below the real value of the [*369] *property. They had estimated the land at about 29*l.* per acre; and it was proved that 40*l.* per acre and upwards had been offered for it. It was impossible, therefore, to avoid entertaining strong doubts concerning the fairness of the terms of the purchase; and the court, so long as it felt these doubts, could not enforce the contract.

 1823.—*Parken v. Whitby*.

To the first of the two objections, Mr. *Shadwell* and Mr. *Roupe*ll replied, that the court could not listen to any allegations concerning a supposed parol agreement, by which, upon a certain event, Whitby was to retain part of the property comprehended in the written contract: for no such matter had been put in issue in the cause; and, consequently, Parken had not had an opportunity of either explaining or disproving the circumstances, of which his adversary now sought to take advantage.

On the subject of value, they relied on the evidence of their own witnesses, several of whom swore that the price fixed was as much as the property was fairly worth; and they further contended, that, in a contract like the present, the court was bound by the opinion of Franklin and Olley. The agreement had stipulated expressly that the price should be fixed by these two gentlemen; it had been fixed by them; and to look now at any other mode of estimating the value, would be a departure from the contract in one of its most essential terms. *Milnes v. Gery*(a)

THE MASTER OF THE ROLLS:—The contract between these parties comprised not only all Whitby's real property, but everything which he was possessed of: and the price of the whole was to be *1,364*l.* 14*s.* That is the agree- [*370]ment which I am called upon to execute *in toto*: and, if I grant the plaintiff the relief which he prays, I must order the real estate to be conveyed and the personalty to be delivered to him, and that he, on his part, pay the 1,364*l.* 14*s.* Such a decree, however, would be altogether wrong: it would give the plaintiff a right to recover goods, to which his own witness, corroborated by his own answer, proves that he has no title; and it would render him liable to pay 79*l.*; which, it is admitted on all hands, he ought not to pay, for it appears from Parken's answer, that after the valuation by Franklin and Olley, the vendor retained the furniture, linen, china, &c., and, in respect of them, the purchaser made a deduction from the price. This is an ad-

(a) 14 Ves. jun. 400.

 1823.—*Parken v. Whitby.*

mission that the written contract was in part done away with; so that it is clear that the court has not the whole of the case before it. Then the testimony of Burleigh explains how it happened, that many of the articles comprised in the valuation were retained by the vendor. From him I learn, that the agreement set forth in the pleadings was accompanied by a collateral verbal agreement, by which, upon a certain event, the written contract was to become inoperative in part: and this collateral agreement was of such a kind as to be *ab initio* a fraud upon the laws; for the object of it was to screen Whitby's personal effects from the consequences of a conviction under the Game Acts in a prosecution then pending against him. If he was convicted, the written contract was to take effect: it was not to take effect if he was not convicted.

The counsel for the vendor have insisted, that, upon this ground alone, the bill ought to be dismissed. And, undoubtedly, if the pleadings had stated that the contract involved, or was accompanied by, an agreement intended to be a fraud upon the game laws, the court would not entertain a suit for specific performance. But the circumstances, on which the objection arises, are not stated either *in the cross bill or in the answer to the original bill; so that Parken has had no opportunity of defending himself against them. The original suit, therefore, is not now ripe for dismissal.

On the other hand, it has been argued, that the court cannot take any notice of the existence or nature of this collateral agreement, because, in the pleadings, nothing has been in issue concerning it. Suppose a bill were filed for the specific performance of a contract for the purchase of a cargo of spirits, and it were to appear in the course of the evidence that the cargo was smuggled; the court would not shut its eyes to a fact so presented to it, even though neither party had put the fact in issue. Here it comes out from Parken himself, that the contract stated in the bill is not the whole contract; and must I not know the whole contract, before I am called upon to decree specific performance?

1823.—*Parken v. Whitby*.

It comes out, too, from Parken's own witness, that the written contract was accompanied by another agreement apparently of an illegal nature: must not this point also be cleared up, before the court can deal finally with the cause? The proper course would be, to put these matters in a train of investigation, by directing an inquiry, whether the written contract was accompanied by any and what agreement concerning Whitby's furniture, plate, linen, china and books; and on what account it was that the vendor retained some of the articles included in the contract, while the purchaser made a deduction from the amount of the valuation.

I think that there must likewise be an inquiry with respect to the value of the land. The evidence impeaching the valuation of Franklin and Olley is, in its nature, more to be depended upon than the testimony of the surveyors by whom that valuation has been supported. My own opinion upon the evidence is, that the land was worth more than the price which has been fixed: and I certainly *cannot accede to the position, [*372] that, because the parties, by their contract, referred the ascertaining of the value to two individuals, the court is bound by the judgment of those individuals, and cannot have recourse to other means in order to satisfy its own conscience.^(a) The price was not to be fixed arbitrarily; the intention of the parties was, that the land should be sold for its full value; and the reference to the judgment of Franklin and Olley was merely the mode of fixing that value. If the court were satisfied, that the price set by them on the property did not come near the true value, it would never interfere to enforce the performance of the contract.

A witness, named Carter, having been examined for Whitby, Mr. *Shadwell* objected to the reading of his evidence, because he

(a) *Emery v. Wase*, 5 Ves. jun. 846, and 8 Ves. jun. 517; *Hall v. Warren*, 9 Ves. jun. 695.

 1823.—Gordon v. Rutherford.

had admitted upon cross-examination, that he conceived himself bound in honor, though not legally bound, to contribute to the expenses of the cross suit, as it was partly at his recommendation that Whitby's solicitor had undertaken and continued to prosecute the suit.

Mr. *Sugden*, contra, cited the cases mentioned in Phillips' Treatise on the Law of Evidence.(a)

The MASTER OF THE ROLLS was of opinion, that, according to the latest authorities, the evidence was admissible.

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*GORDON v. RUTHERFORD.

ROLLS.—1823: 20th November.

A testator gives a sum of stock to trustees, which they are to stand possessed of upon trust for D. G. until he shall attain the age of twenty-five years, and are to transfer to him when they in their discretion shall think proper; he likewise directs, that if D. G. dies without lawful issue before receiving the bequest, the stock shall sink into the residue of his the testator's estate; and he bequeaths the residue to W. F.; while D. G. is under twenty-five years of age, and has not had the stock transferred to him, neither he nor W. F. is entitled to receive the accruing dividends; but these dividends must accumulate, to accompany the capital in its final destination.

A testator directs, that W. F. shall, with a capital taken out of his assets, continue his the testator's business; that he shall bind D. G. apprentice to himself; that he shall take D. G. into partnership at the end of his apprenticeship, or so soon after as he shall think him capable; and that D. G. shall have one-third of the profits of the business: D. G. is not entitled to claim any share of the profits which are made before he is admitted into partnership.

JAMES STUART, by his will dated the 23d of April, 1821, bequeathed to his three trustees and executors (of whom William Forbes was one) various sums of stock, upon trust, as to the sum of 33,333*l.* 6*s.* 8*d.* 3 per cent. consolidated bank annuities, to pay, out of the dividends thereof, to his wife Elizabeth Stuart a

(a) Vol. I., p. 54, 55. Fifth edition.

1823.—Gordon v. Rutherford.

clear annuity of 1,000*l.* per annum, during her life: and upon further trust, that, immediately after her death, they should transfer to the testator's nephew William Forbes one moiety of the said sum of 33,333*l.* 6*s.* 8*d.* 3 per cent. cons., and for him to receive 500*l.* per annum, being the moiety of the amount of the dividends of the stock, he taking the name and using the arms of Stuart: and, upon further trust, as to the sum of 16,666*l.* 13*s.* 4*d.*, the remainder of the sum of 33,333*l.* 6*s.* 8*d.* 3 per cent. cons., that his said executors and trustees should stand possessed thereof upon trust for his nephew Donald Gordon, until he should have attained his age of twenty-five years. The testator then directed his executors and trustees, the survivors and survivor of them, their executors and administrators, to transfer the said sum of 16,666*l.* 13*s.* 4*d.* unto Donald Gordon for his own use and benefit, when and so soon as they should in their discretion think proper: and, in case Donald Gordon should die without lawful issue *before receiving the bequest, the said sum [*374] of 16,666*l.* 13*s.* 4*d.* was ordered to sink into the residue of the estate.

In a subsequent part of the will, the testator, after directing that his trade should be carried on by William Forbes, with a capital to be taken out of his personal estate, expressed himself as follows: "I request and direct, that William Forbes shall take under his care and protection, and educate and support the said Donald Gordon, until he shall have obtained a proper age to be bound apprentice, and when he shall have attained that age, then I direct, that the said William Forbes shall bind the said Donald Gordon apprentice to himself; and from and after the said apprenticeship shall have expired, or so soon after as the said William Forbes shall, in his judgment, think the said Donald Gordon fit and capable, he the said William Forbes shall take the said Donald Gordon into the said trade and business as a co-partner therein, and that the said Donald Gordon shall have one-third part or share of the profits of the said business with the said William Forbes." He also gave to William Forbes the residue of his personal estate.

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The testator died in 1821, and his wife survived him by only a few months. When she died, Donald Gordon was about ten years of age.

The stock was standing in the names of the trustees; and the principal question was, who was entitled to the dividends of the 16,666*l.* 13*s.* 4*d.* 3 per cent. cons., from the death of the widow until there should be a transfer of the legacy to Donald Gordon.

Mr. *Wingfield*, for Donald Gordon:—The testator has separated this sum of 16,666*l.* 13*s.* 4*d.* stock from the general mass of his estate, and has given *it to trustees who are to stand possessed of it expressly upon trust for Donald Gordon, until he shall have attained a particular age. In the meantime, the stock is held, and consequently, the dividends are received, in trust for him. To decide that any other person is entitled, or that Donald Gordon is not entitled to the accrued and accruing dividends of the stock, would be to declare that the trustees are not now trustees for Donald Gordon.

Mr. *Shadwell* and Mr. *Barber*, for William Forbes:—The will directs, that if Donald Gordon shall die without issue before receiving the legacy, the 16,666*l.* 13*s.* 4*d.* is to sink into the residue; and that residue is given to William Forbes. Thus there is an express gift of the legacy over upon the happening of one contingency. Now the authorities decide, that, where a legacy payable at a future time is given over in case a particular event happens before it becomes payable, the time of vesting is attached to the time prescribed for payment. *Palmer v. Mason*; (a) *Herle v. Greenbank*; (b) *Muckell v. Winter*. (c) Hence it follows, that Donald Gordon has not a vested interest in the legacy; and, consequently, he cannot now be entitled to the dividends of the stock. Under these circumstances, the dividends which shall accrue in the interval between the death of the widow and the vesting of the legacy, must sink into the residue, and go as part

(a) 1 Atk. 505.

(b) 3 Atk. 718.

(c) 3 Ves. jun. 536.

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of the residue to the residuary legatee. The trust for Donald Gordon is of the corpus of the stock only.

THE MASTER OF THE ROLLS:—The question upon this will presents three different aspects. First, are the dividends of this sum of stock to go immediately to the infant during his minority, and before any transfer is made to him? or secondly, do they belong *in the meantime to the residuary legatee? [*376] or thirdly, does the right to them remain in suspense, until the event shall have shown whether the legacy is to go over from Donald Gordon or not?

This testator has given a sum of stock to trustees, who are also his executors, and has directed them to hold it in trust for Donald Gordon, until he shall have attained his age of twenty-five years. Thus far there are words of express gift to the trustees only. He next adds, that they are to transfer the stock to Donald Gordon, when and so soon as they shall in their discretion think proper. So that there are no direct words of gift to Donald Gordon, except through the medium of the discretionary transfer by the trustees, and there is no fixed time at which that transfer is to be made. If he should die without issue, before the stock is transferred to him, the bequest is to sink into the residue, and, as part of that residue, will go over to William Forbes. The vesting of the legacy, therefore, must in the meantime, be suspended. For these reasons, it seems to me impossible to hold, that Donald Gordon can have any present right to the dividends.

At the same time, this much is clear, that, until Donald Gordon attains twenty-five years of age, the trustees are to hold the stock in trust for him. Then, how can it be the true construction of the will, that the dividends are in the meantime to belong to William Forbes? Surely, if the residuary legatee were now entitled to those dividends, the present trust would be for that residuary legatee, and not for Donald Gordon. It has been said, indeed, that the trust is of the corpus of the stock only, and not

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of the dividends: but the testator had no intention to separate the dividends from the corpus; he meant generally that the right to the capital should draw to it also the right to the interest.

The will contains no intimation that William Forbes is [*377] to have the intermediate *dividends: on the contrary, it states in express terms what interest the residuary legatee is to have in this sum of stock; and that is an interest which is to arise only in one event—the event of Donald Gordon's death without issue before the stock has been transferred into his possession.

The due construction of the will is this: During the period which shall elapse, until the trustees think fit to exercise the discretion reposed in them, the dividends and interest are not disposed of, and are reserved to await the final disposition of the capital; but if at any time the trustees transfer the stock to Donald Gordon, from that moment the original trust, which attached upon it at the testator's death, takes effect in his favor; and, having the principal transferred to him, he becomes entitled, also, to the accumulated dividends.

William Forbes, in pursuance of the directions contained in the will, carried on the trade after the testator's death; and the bill insisted that he was a trustee of a third part of the profits for Daniel Gordon.

The MASTER OF THE ROLLS was clearly of opinion that Daniel Gordon's right to participate in the profits of the trade, which was to be continued with a capital taken from the testator's estate, commenced only from the time when he should be admitted into the partnership. William Forbes was to educate and support him, and was afterwards to bind him apprentice to himself; was it likely that the testator should have required William Forbes to support his own partner, or that he should have intended Donald Gordon to be at once partner and apprentice in

1823.—*Farquharson v. Seton*.

the same mercantile concern? Until the young man's apprenticeship should have expired, the business was to be carried on by Forbes, that is, by Forbes solely, and for his own profit.

**FARQUHARSON v. SETON*.

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1823: 24th November.

Where a cause was not proceeded in for three clear terms after answer, the common order to dismiss the bill for want of prosecution, obtained by the defendant in the vacation after the third term, was held to be regular.

THE defendant Seton put in his answer to the plaintiff's further amended bill in the vacation after Michaelmas Term, 1822, and, the plaintiff not having proceeded, obtained the common order to dismiss the bill for want of prosecution in the vacation after Trinity Term, 1823. A motion was now made to discharge the order with costs for irregularity.

Mr. *Agar*, in support of the motion, contended that the order was irregular, insisting upon the plaintiff having been entitled to three clear terms, and the vacation after the last term, to proceed with the cause. He cited *Mangleman v. Prosser*,^(a) and *Findlay v. Wood*.^(b)

Mr. *Palmer* against the motion.

THE LORD CHANCELLOR, having consulted the Registrar, said that he was of opinion that the plaintiff was not entitled to the vacation; but, it being stated that a misunderstanding had prevailed as to the practice, his Lordship discharged the order, the plaintiff paying the costs.

(a) 3 B. C. C. 181.

(b) 1 V. & B. 499.

 1823.—*Shepherd v. Towgood*.

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*SHEPHERD v. TOWGOOD.

1823: 18th and 24th November.

A creditor, who makes out a *prima facie* case of misconduct in trustees, is entitled to a decree that they shall account for whatever they might have received without their wilful default or neglect; though, in a prior suit instituted by another creditor and conducted without collusion, a common decree for an account has been previously made against them.

IN 1803, the banking house of Messrs. Strange, Dashwood & Co. being in embarrassed circumstances, James Strange, James Dashwood, John Agnew and George Peacocke (who were the partners in it) did, by deeds bearing date on the 19th of July, assign and convey all their property, whether joint or several, to Towgood, Ingram and Burrowes, their heirs, executors, administrators and assigns, upon certain trusts. These trusts, in substance, were, that the property should be gotten in and sold; that, out of the produce of the separate estate of each partner, his separate debts should be paid ratably, and the surplus of it, if any, carried over to the partnership funds; that the partnership funds should be applied in payment of the joint creditors ratably; that the surplus, if any, of the share of each partner in the joint funds should go in discharge of such of that partner's separate debts as had not been previously satisfied out of his separate estate; and that the ultimate surplus should be paid to the four partners in such proportions as might be according to their several rights. The first dividend was to be

[*380] made whenever the *trustees should have money enough to pay four shillings in the pound upon the debts; and further payments were to follow from time to time, as often as funds should be realized sufficient to yield one shilling in the pound. The trustees were likewise invested with various powers, one of which was, "to settle and agree with any of the creditors, whose respective debts together do not amount to more than 3,000*l.*, and to make them such payment or compensation for the same by way of composition as they may respectively agree to accept." On the other hand, the creditors, who were parties to

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the deed, agreed not to institute any suit or action (except under the deed of trust) for the recovery of their debts; and they granted to the four partners a license, which was to be in force until the trustees should declare it to have ceased, to go about their affairs without impediment to their persons or subsequently acquired property.

Towgood and Ingram, but principally the former, acted in the execution of the trust. In May, 1805, a dividend of two shillings and sixpence in the pound was paid.

At the time of the creation of the trust, Strange, Dashwood, Agnew and Peacocke were indebted to Lord Viscount Anson, both in a considerable sum, secured by their joint and several bond, and also on a balance due upon his banking account. In June, 1805, his Lordship filed a bill, on behalf of himself and all the other creditors, against the trustees and other necessary parties, praying that an account might be taken of Strange's separate estate and separate debts, that the sum due to him, Lord Anson, on the joint and several bond might be discharged out of that separate estate; that an account might likewise be taken of the trust property which had come into the hands of the trustees, and of their payments in respect thereof, and that the deed of trust might be carried into execution under the direction of the court.

*In 1811, the trustees compromised this suit by paying Lord Anson his bond debt and 500*l.* for his costs. [*381]

On the 9th of February, 1819, another suit on behalf of creditors was instituted by the personal representatives of Lord Anson, along with some other members of the same family, who had claims upon the trust property. The bill mentioned the former suit, and the termination of it by a compromise, but did not make that transaction a ground of charging the trustees with negligence or misconduct; and it prayed, among other things, that an account might be taken of all the joint and separate

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estates of Strange, Dashwood, Agnew and Peacocke, which had been possessed or received by Towgood and Ingram, or without their wilful neglect or default, might have been received by them. In that suit, John Stevenson Salt was, in December, 1819, appointed receiver; and, on the 18th of May, 1822, a decree was made. By that decree it was declared, that the deeds of the 19th of July, 1803, ought to be established, and the trusts thereof carried into execution; and it was ordered, that the Master should take an account of the joint and separate estates of Strange, Dashwood, Peacocke and Agnew, which had been possessed and received by Towgood and Ingram, or either of them, or by any person or persons by their or either of their order, or for their or either of their use, and how they had applied and disposed of the same—that he should appoint new trustees in the room of Burrowes and Ingram—and that he should take the usual accounts of the joint and separate debts due from the co-partnership, and from the individual partners, and of the payments which had been made in respect of any of those debts.

In the meantime, the mode in which a portion of Mr. Dashwood's separate estate had been dealt with, gave rise to another suit. Upon the marriage of that gentleman with Sarah [*382] Moseley in January, 1786, 2,000*l.* four per cent. *bank annuities, and a sum of 16,000*l.* were transferred and paid to Mrs. Betty Purchase; and it was by the marriage settlement declared, that Mrs. Purchase should stand possessed of those two sums, upon trust to receive the annual interest and dividends thereof, and to pay the same to James Dashwood during his life, for his sole behoof and advantage. The annual income of this fund was received by Mrs. Purchase during the whole of her life; and after her death, which happened in 1814, it was received by her executors, Burley and Walcot; but neither Mrs. Purchase nor her executors had accounted to the trustees of Strange, Dashwood & Co., for the dividends and interest which accrued subsequently to the execution of the indentures of the 19th of July, 1803. Under these circumstances, the receiver in 1820, filed a bill in his own name, and in the names

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of the trustees, and of Strange, Peacocke and the assignees of Agnew, against Dashwood and his wife, and Burley, the surviving executor of Mrs. Purchase, in order to compel payment of those dividends. That suit was still pending.

The present bill was filed in November, 1821, by two joint creditors of Strange, Dashwood & Co., on behalf of themselves and all the other creditors of Strange, Dashwood, Peacocke and Agnew. It accused the trustees of gross negligence, and breach of trust; specifying, as particular instances of misconduct, their compromise of Lord Anson's suit, and their omission, during a period of nineteen years, to compel payment of the yearly income of the fund which was vested in Mrs. Purchase. It insisted, that they ought to be personally answerable for the loss which the estate had sustained by their failure to perform their duty: and, in addition to the usual accounts, including an account of all that Towgood and Ingram, without default or neglect might have possessed or received, it prayed specifically, that they might be charged with the whole annual dividends of the trust funds received *after the 19th of July, [*383] 1803, by Mrs. Purchase or her personal representatives, or with so much of those dividends as they, without their wilful default or neglect, might have received.

The defendant, Towgood, by his answer, contended that this bill was altogether unnecessary and vexatious, and that every purpose, which was sought by it, might be fully accomplished under the decree made in Sir George Anson's suit.

The plaintiffs did not enter into any evidence, but relied on the admissions in Towgood's answer, relative to the compromise with Lord Anson, and the transaction with Mrs. Purchase.

Upon the first of these points, the following were the principal admissions:—"that the trustees did, with a view of putting an end to an expensive suit, which had been commenced against them by Viscount Anson, to enforce payment out of the separate estate of James Strange, of the amount due from Messrs. Strange,

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Dashwood & Co., for principal and interest on their joint and several bond, pay to Lord Anson, out of such of the trust funds as arose from the separate estate of James Strange, the amount due for principal and interest on the bond, together with the sum of 500*l.* in lieu of his costs and expenses, and also over and above the dividend of 2*s.* 6*d.* in the pound, which was paid to him out of the trust funds belonging to the joint estate upon the amount due to him on his banking account; that such payments out of the separate estate of Strange were made to Lord Anson, in pursuance of a proposal and agreement entered into between this defendant and his co-trustees or their solicitor, and Lord Anson or his solicitor, for putting an end to the suit, which proposal and agreement were made and entered into under the advice of eminent counsel, and with the sanction of some [*384] of the principal creditors of Messrs. *Strange, Dashwood & Co.; that such agreement was highly advantageous to the creditors of the said estate, and particularly to the joint creditors, inasmuch as the suit, if proceeded in, must have put the estate to very great costs and expenses, which were saved by the means actually used; that no bill was made out or produced showing in what manner the costs, in respect of which the said payment was made by this defendant and his co-trustees, were incurred; but the defendant was induced to believe, at that time, and now believes, that the costs, which the trust estate was liable to pay in the suit, were very considerable, and would, if ascertained in the usual manner, have amounted to the sum of 500*l.*: and, that the suit was so compromised by this defendant and his co-trustees for the purpose and with the view of benefitting the trust estate."

The following was the account given by Towgood's answer of the circumstances under which Mrs. Betty Purchase and her executors had been permitted to receive the dividends and interest of the two sums of 2,000*l.* 4 per cent. bank annuities, and 16,000*l.* in which Mr. Dashwood had by his marriage settlement, a life interest; "that, in the year 1801, Betty Purchase lent to the house of Dashwood & Co., the sum of 6,357*l.* 15*s.* 4*d.*, 3 per

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cent. consolidated bank annuities, and the sum of 2,000*l.* 4 per cent. bank annuities, part of the funds purchased with the money settled on the marriage of James Dashwood; that for securing the same, Strange, Dashwood & Co., did by an indenture, bearing date on the 11th of March, 1801, assign unto Betty Purchase 8,000*l.* and interest, and the security for the same, which sum was due to Strange, Dashwood & Co., on a mortgage of certain hereditaments in St. James' street; that, after the execution of the indentures of the 19th day of July, 1803, Betty Purchase made proposals to this defendant, and his co-trustees, for the purchase by her of the life interest of James Dashwood, in the two sums of 2,000*l.* 4 per cent. bank annuities, and 16,000*l.*, and much *negotiation on the subject of [*385] such proposal took place;—that it was proposed on the part of Betty Purchase, that she should pay 5,000*l.* for such life interest, and the proposal was acceded to on the part of this defendant and his co-trustees, but no agreement was then definitively concluded;—that a further negotiation afterwards took place, when Betty Purchase proposed that this defendant and his co-trustees should accept the sum of 6,357*l.* 15*s.* 4*d.* 3 per cent. bank annuities, and 2,003*l.* 4 per cent. bank annuities, secured to her by the said assignment of the said sum of 8,000*l.* and interest, and the mortgage for the same, as part of the purchase money for Dashwood's life interest; that the trustees, having been advised, that they could not under the powers given by the indentures of the 19th day of July, 1803, sell a part of the separate estate of James Dashwood, and take in payment for the same a release of a debt due from the joint estate of Messrs. Strange, Dashwood & Co., declined that proposal; that Betty Purchase, to the time of her death, and her executors, after her death, received the dividends and interests of such part of the two sums of 2,000*l.* 4 per cent. bank annuities and 16,000*l.*, as had not been advanced and lent by her to Messrs. Strange & Co.;—that, after the death of Betty Purchase, some further negotiation took place between her executors and the trustees, relative to James Dashwood's life interest in the two sums in question, but they were not able to come to any satis-

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factory arrangement, and that, in consequence thereof, a suit, for the purpose of recovering the amount of the dividends and interest on the two sums of 2,000*l.* 4 per cent. bank annuities and 16,000*l.*, was commenced in 1820; that the same was not commenced sooner in consequence of the negotiations, which, from time to time, took place between the trustees and Betty Purchase, in her lifetime, and her representatives after her decease, which negotiations, it was hoped, would have led to an amicable termination of the matters in difference, without the [*386] *necessity of resorting to proceedings either at law or in equity."

Mr. *Shadwell* and Mr. *Stephen*, for the plaintiffs:—We have made out, in two different instances, a strong *prima facie* case of misconduct against these two trustees. They have been guilty of gross negligence in omitting to get in the trust property; and they have expended part of it in an improper compromise of a suit, which would have forced them to come to an account. Under these circumstances, a creditor is entitled, not merely to the common decree for an account, but to a decree making them responsible for all that they might have received, without wilful default or neglect. We admit that suits are not to be multiplied without adequate cause; that, after one creditor has filed a bill, and, much more, after he has obtained a decree, another creditor is not to institute a second suit for the same object, but we now come for relief which the former suit has not given, and could not give. The decree in *Anson v. Towgood* is useful, so far as it goes, but it does not go far enough; and the object here sought is, to extend and complete the investigation which that decree has left imperfect.

Mr. *Horne* and Mr. *Daniel*, for the trustees:—The compromise of the former suit is mentioned in Sir George Anson's bill; and, even if it had been omitted, all the relief that can be prayed with respect to it, might be had under the existing decree. For, if the payments made by the trustees on that occasion were improper, the allowance of them, in the trustees' account may be

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resisted in the Master's office, which will necessarily bring the whole subject before the view of the court or of its officers. The inquiries too, which will be prosecuted under that decree, will show what part of that trust property has been gotten *in, and what part of it is still outstanding; and upon [*387] the report of the Master, such further investigation or proceedings may be directed as shall then appear to be expedient. In that way the transactions with Betty Purchase may be sifted; if, indeed, it is proper to discuss them in any suit, except that which has been instituted for the express purpose of ascertaining the rights of the trust fund against the representatives of that lady. The bill, therefore, introduces nothing which was not previously before the court, or might be brought before it, in suits already pending; it asks no relief which might not have been had in the prosecution of the decree already pronounced. The sole object and effect of it is, to throw upon the trustees the oppression, and upon the trust fund the costs of two suits instead of one.

The plaintiffs have no evidence, except the statement contained in the answer of Mr. Towgood. He denies that he has been guilty of wilful default or neglect; and he swears, that, in the two transactions particularly alluded to in the bill, everything was done, *bona fide*, for the benefit of the creditors. What more could be required of trustees? how, upon such a state of the evidence, can it be assumed, that they have been guilty of wilful neglect or default?

Mr. Sugden, Mr. Pepys, Mr. Treslove and Mr. Turner, for other defendants.

November 24th.—THE MASTER OF THE ROLLS:—The outline of the case is extremely simple. It is a bill filed by creditors on behalf of themselves and all other the creditors of certain persons, calling for an account against trustees, to whom the effects of the debtors were long ago assigned. Had the account sought been a simple account in the ordinary form, and had

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[*388] there been *no antecedent suit, the decree would have been quite of course. The difficulties, that present themselves, arise from two causes. The first is the particular nature of the account prayed. The plaintiffs are not satisfied with an account against the trustees in the common form, but desire that there should be an immediate inquiry whether the trustees have been guilty of any wilful neglect and default. For such a decree a special case must be made; and it is insisted, on the part of the defendants, that there is not a sufficient case made out to entitle the plaintiffs to an account in that form.

Secondly, it is said that—even if such a case were made out, still—considering that this bill is filed in November, 1821, after an antecedent suit, which is at this moment depending, and has been the subject of a decree pronounced in the year 1822, between, substantially, the same parties, and directed to the same general objects—an objection arises to it on the ground of the unnecessary multiplication of suits, and the consequent aggravation of expense to a fund like the present, if a latitude be given to creditors successively to file different bills for the execution of the same trust.

The subject of inquiry thus divides itself into two questions: First, supposing that this were the first and only suit, do the plaintiffs bring forward a sufficient case to entitle them to the relief prayed? Secondly, do the proceedings in the prior suits constitute a valid objection to that relief?

In order to entitle them to the special relief prayed, the plaintiffs bring forward two transactions: the first is the compromise of the suit instituted by Lord Anson; the second, the transaction relating to Mr. Dashwood's life interest in certain funds, which, it is alleged, the trustees have not used due diligence in recovering, for the benefit of *the creditors.

[*389] What the court has to advert to is, the facts relating to these two transactions, as they are detailed in the answer, with all the qualifications therein contained.

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[Here the Master of the Rolls read the statements of the answer relating to the compromise of Lord Anson's suit.]

Now, it will be observed that the trustees had not, by the trust deed, any special authority to compromise suits. They had authority to compromise the amount of a debt, but they had no authority expressly given to them to compromise any suit. In the next place, as far as we can follow analogy, persons standing in a situation somewhat similar to that of trustees, I mean assignees of a bankrupt's estate, are expressly prohibited from compromising or instituting any suits, without calling the creditors together and having their sanction. It is not pretended that any such meeting was held; it is expressly admitted that the compromise was without the privity and consent of the present plaintiffs. The defendant says that it is stated that the compromise was made with the privity of the principal creditors, under the advice of counsel, and *bona fide*, with an object to save expense. But the question is not whether they might not have conducted themselves substantially with a view to benefit the estate, but whether trustees can be permitted to act in this manner, without being subject to further inquiry into their conduct?

What was the nature of the suit which was thus compromised? It was a suit by creditors calling only for an account from the trustees; and it had been permitted to go on for five years without any attempt to stop it. In the next place, the trust estate gained nothing by what is called a compromise, except that an end was put to the suit; and that was purchased by the payment to Lord Anson of the principal and interest of his bond, and also of 500*l.* for costs—those costs not being taxed, not being even ascertained *by the delivery of any bill. This payment is made at a time when all that could have been the result of going on with the suit would have been an inquiry into the conduct of the trustees in the execution of their trust. [*390]

Now if, in general, there is an obligation on trustees, before

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they compromise suits, to give the creditors an opportunity of meeting, in order to consider the propriety of making a compromise, there is a peculiar propriety in their doing so, when the sole object of the suit proposed to be compromised is, to inquire into the conduct of the trustees, and to transfer the management of the trust to this court. Besides, what did the trustees gain? That suit was not more objectionable than any other. Benefit might have resulted, if all had been content to leave the matters of the trust to private management; but, considering the number of creditors, and the difficulty of keeping them quiet, there was great probability (particularly when 500*l.* had been paid to stop one suit) that another suit would soon spring up. Accordingly, in 1819, other members of the same family file another bill, thus involving the estate in the expense of all the stages of a new suit. Under these circumstances, I feel that this is a transaction, which ought to be inquired into.

The next point upon which the plaintiffs rely, arises out of the transaction relative to Dashwood's life interest in certain sums.

[Here the Master of the Rolls read from the answer the statement of these transactions.]

Here not a single step is taken, down to 1820, for the recovery of property, considerable in amount; though not only was the general obligation cast on the trustees of making the estate productive to the utmost on behalf of the creditors, who, trusting to the zeal and activity of the trustees, had surrendered all right of recovering payment of their *debts, but they had agreed to render accounts half-yearly for the inspection of the *cestuis que trust*, which showed that they were, from time to time, to make the property available as fast as they could. Is it possible to state that this is not a case of wilful neglect? In the year 1820, it is said, a suit was instituted to recover this demand. But, in the first place, that is a suit by the receiver; in the next place, it is not directed against the trustees to make them responsible for their neglect, but against

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the representatives of Betty Purchase, to make them refund what has been improperly received by them or their testatrix.

The difficulties are not slight, which are thrown in the way even of that suit by the neglect of the trustees to assert their right at an earlier period. But its existence has not the smallest bearing on the propriety of the present demand. The creditors are not to be sent round to Betty Purchase, and to those who were permitted to receive what belonged to the trust fund. They have a right to resort to the trustees without the least reference to Betty Purchase, and to make them personally responsible for the consequences of their neglect. I am, therefore, of opinion that, supposing this to be the first and only suit, there is a clear right in the creditors to extend the relief against the trustees in the way proposed by the bill.

The second question is, whether the existence of a prior suit constitutes a bar or an objection to the institution of another suit on the behalf of creditors praying extended relief. Substantially, a bill by one of a set of creditors, on behalf of themselves and all others, is considered as making all those creditors parties to it; and the court will never permit a second or third suit to be instituted for the same object, with the same parties, and directed to the same relief. If the relief in the first suit can be extended, if expense can be saved by incorporating with the suit any proceeding that will avoid the necessity *of [*392] a second bill, there may be a great propriety in not permitting another suit to go on. But, on the other hand, it never can be contended, nor is it the law of this court that a second suit may not be rendered necessary, either by collusion in the former suit, or by the inattentive mode of framing it, which may have left out some principal matters of charge against the trustees, or by the omission, from ignorance or negligence, of some important ground of relief. In fact it was so decided in the present case; for, when a motion was made to stop the proceedings in this suit, if the bare circumstance of an antecedent depending suit constituted a good bar, it would have been

1823.—Shepherd v. Towgood.

stopped immediately. It was, however, permitted to proceed to a hearing; in order to see whether the plaintiffs would make out an apology and justification for it by showing substantial novelty. They have done so; they have correctly supplied, in important particulars, that which could not have been introduced in the former suit. That creates, on their part, a fair and just claim to relief from a court of equity. Were it otherwise, there would be a failure of justice. It never can be permitted that the priority of a suit defective in its nature is to exclude another suit that may introduce important matters, without which complete justice cannot be done to the creditors.

The question then is, does the present suit introduce such substantial novel matter as makes it fitting to be received, supplementary to the antecedent suit? And is it become absolutely necessary?

The proceedings in the suit of Sir George Anson appear to have been conducted very properly; but that suit, though it introduces the compromise of the former suit, and the payment of the 500*l.*, does not state them in the same way as they are stated here, nor as matter of charge against the trustees. On the subject of the transaction with Betty Purchase, it is totally [*398] silent. *If, therefore, there was a necessity to vindicate the rights of the creditors on the two subjects I have mentioned, there was unquestionably a necessity for another suit. At the same time we must be careful to guard against any unnecessary expense.

This suit must be supplemental to the former suit, and incorporated with it; it must be referred to the same Master; the solicitor for these creditors must have liberty to attend the proceedings under the former decree; and the general account is not to be gone into anew.

The decree was as follows :—Declare that the plaintiffs, on behalf of themselves and all other the creditors of James Strange,

1823.—Tyson v. Cox.

James Dashwood, John Agnew and George Peacocke, are entitled (in addition and by way of supplement to the account which has been already directed by the decree, bearing date the 18th day of May, 1822, made in this cause, wherein Sir George Anson and others, are plaintiffs, and John Towgood and others, are defendants), to a further account of all the joint and separate estate and effects of the said defendants James Strange, James Dashwood, George Peacocke and Edward Howell, or either of them, which, without the wilful neglect or default of the said John Towgood and John Ingram, or either of them, might have been received or possessed by them or either of them; and let it be referred to Master Stratford (to whom the cause of *Anson v. Towgood* stands referred), to take this additional account accordingly; but the Master is not to take over again or disturb any account which has been already taken by him, further or otherwise than may be necessary to let in any charges of wilful neglect or default, which the plaintiffs in this cause may be able to substantiate; and let the Master *inquire and [*394] state to the court, whether any and what loss, and to what amount, if any, has resulted to the trust estate of the said James Strange, James Dashwood, George Peacocke and John Agnew, from any such wilful neglect or default, in case any such shall appear to have been committed, and the Master is to be at liberty to state any special circumstances respecting the same as he shall think fit; and, for the better taking of the accounts, &c., the parties are to be examined, &c.; and let the plaintiffs in this suit be at liberty to join in, and attend the said Master upon the several proceedings before him, under the decree made in the said cause of *Anson* against *Towgood*; let due notice be given of such several proceedings to the plaintiffs in this suit, in like manner as if they had been parties in such former suit; and reserve the consideration as to the question of interest, and also or all further directions, and of the costs of this suit, &c.

 1823.—Tyson v. Cox.

[*895]

*TYSON v. COX.

1823: 25th November.

A. and B. entered into a joint and several bond for securing a sum of money advanced to A. by his bankers. After the execution of the bond, and before it became due, A. paid money to the bankers and he continued to draw upon them until his banking account was overdrawn. Some years afterwards an account was settled between A. and the bankers in which the whole money secured by the bond was treated as remaining due from A. The bankers then took a warrant of attorney from A. for securing payment of the balance found due upon the settlement by instalments at distant periods. Several of the instalments were paid, but A. became bankrupt before the whole debt was liquidated. It being proved that B. was privy to the settlement of accounts between A. and the bankers, and to the arrangement respecting the warrant of attorney; held, first that B. was not discharged by the time given to A., and secondly, that the bond was not discharged by the course of payment, the money paid by A. to the bankers being applicable to the banking account, and the bankers being entitled to hold the bond and warrant of attorney as distinct securities.

Upon the occasion of the bond being executed the title deeds of an estate purchased by A. were deposited with B. as an indemnity against his liability upon the bond; the legal interest in the estate was likewise conveyed to B., and it was agreed that he should also hold it as an indemnity. After the death of B. his executor delivered up the title deeds to A., upon a false representation by him that the bond had been paid off. Held, that a conveyance of the legal estate could not be compelled until the indemnity was worked out, and that the lien upon the title deeds remained.

GEORGE HENRY BROWN and William Price having contracted to purchase a set of freehold chambers in Lincoln's Inn, for the sum of 8,000*l.*, Brown, in the month of April, 1808, borrowed the sum of 1,000*l.* of Messrs. Walpole, Clark and Sisson, his bankers, for the purpose of enabling him to complete the purchase; on the 25th of April, 1808, Brown and Henry [*896] Aspinwall as his surety, *entered into a joint and several bond to Messrs. Walpole & Co. for securing the repayment of the 1,000*l.*, with interest thereon, on the 25th of April, 1804. Upon the purchase being completed, the chambers were conveyed to Aspinwall, in trust for Brown and Price as tenants in common in fee, and the title deeds were deposited with Aspinwall, by way of indemnity to him, as to one moiety of the

1823.—Tyson v. Cox.

chambers, for having joined in the bond; Brown at the same time signed and delivered to Aspinwall the following agreement; I do hereby agree that Henry Aspinwall and his heirs shall stand seised of my moiety of the chambers in Lincoln's Inn, as a security, to indemnify him the said Henry Aspinwall, his heirs, executors and administrators, against the payment of the 1,000*l.* and interest secured to Messrs. Walpole & Co. by the joint bond of him the said Henry Aspinwall and myself, and from all losses and costs in any way relating thereto. Brown had an open cash account with Walpole & Co., as his bankers, at the time of the execution of the bond, and the balance of that account was then in his favor. He also paid money into the banking house of Walpole & Co. after the bond was executed, but before it became payable; and he continued to draw moneys out of the banking house from the time of the execution of the bond until the end of the year 1804, when his banking account, which was over-drawn, was closed.(a) In January, 1807, a settlement of accounts took place between Brown and Walpole & Co., and the sum of 2,259*l.* was found to be due from Brown to Walpole & Co. on the balance of all accounts; upon the occasion of this settlement the whole of the 1,000*l.* secured by the bond was treated as a debt remaining due from Brown; Walpole & Co. then agreed to allow Brown time for payment on his giving security for the whole balance, and *Brown accordingly, [*397] on the 28d of January, 1807, executed a warrant of attorney to Walpole & Co. to confess a judgment against him for the sum of 2,259*l.*, payable by instalments, on the 25th of March, 1807, the 24th of December, 1807, and the 24th of December in each succeeding year until the whole should be paid. The partnership of Walpole & Co. was afterwards dissolved by the retirement of Walpole and the death of Clarke, and Sisson, the surviving partner, became bankrupt. At the date of his bankruptcy, several instalments, which had become due under the warrant of attorney, had been paid by Brown, but the sum of 1,000*l.*, part

(a) The balance due on this account was independent of the 1,000*l.* which was placed in the account to the credit of Brown as cash lent on bond.

1823.—Tyson v. Cox.

of the 2,259*l.*, was remaining unpaid; after the bankruptcy of Sisson, Brown also became bankrupt, and Aspinwall died, having appointed the plaintiff to be his executor. The bond was not removed out of the hands of Walpole & Co. after the execution of the warrant of attorney, nor was any conveyance executed by Aspinwall of the legal estate vested in him. The title deeds of the chambers also remained with Aspinwall up to the time of his decease, but soon after his death, Brown represented to the plaintiff that the 1,000*l.* and interest secured to Walpole & Co. by the bond had been paid off, and the plaintiff delivered up the title deeds to Brown on the faith of such representation.

It was prayed by the bill, that the bond might be delivered up to the plaintiff to be cancelled, or that the plaintiff, in case the court should be of opinion that he was liable to pay any part of the 1,000*l.* and interest under the bond, might be declared to be entitled to a lien on a moiety of the chambers for so much as he should be held liable to pay.

Brown, who had obtained his certificate under the commission issued against him, was examined as a witness in the cause on the part of the assignees of Sisson, and proved, that in [*398] *December, 1806, he had an interview with Aspinwall, who had been applied to by Messrs. Gregg and Corfield, the solicitors of Walpole & Co., for payment of the bond, and that Aspinwall then told him to see Messrs. Gregg and Corfield on the subject, and do the best he could with them; that he accordingly saw Corfield on the subject, and made the arrangement with him respecting the warrant of attorney, and that he afterwards communicated the arrangement to Aspinwall, who expressed himself perfectly satisfied with it.

The cause was heard before the Vice-Chancellor on the 27th of February, 1818, and a decree was then made by which the bill, so far as it sought to have the bond delivered up to be cancelled, was dismissed with costs, and it was declared that the plaintiff had a lien on the title deeds of the chambers, against

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the defendants, the assignees of Brown, for the amount of what he should pay or be liable to pay to the defendants, the assignees of Sisson; Brown's moiety of the chambers was ordered to be sold for the purpose of satisfying the lien.

The plaintiff appealed from so much of the decree as ordered the bill, so far as it sought to have the bond delivered up to be cancelled, to be dismissed with costs.

The appeal was argued by Mr. *Horne* and Mr. *Roupell*, for the plaintiff, Mr. *Hart* for the assignees of Sisson, and Mr. *Wingfield* and Mr. *Beames* for the assignees of Brown; and the Lord Chancellor, having taken time to consider the case, delivered the following judgment.

The first question in this case is whether Aspinwall was entirely discharged from all liability upon the bond in consequence of the arrangement made between Brown and Walpole & Co. There can be no doubt that he was so discharged if that arrangement was made without *his knowledge or con- [*399] sent, and he did not subsequently approve or confirm it, as the result was to give Brown, the principal debtor, time to pay the bond by various instalments. It is unnecessary to state the grounds upon which the court has held that doctrine; it was much considered in the case of *Rees v. Berrington*.^(a) The question to be decided as to the continuing liability of Aspinwall depends, therefore, entirely upon what is the fair result of the evidence of Brown, as it does or does not afford an inference that Aspinwall knew of the arrangement with Walpole & Co., or, whether he knew of it or not, that he constituted Brown his agent for the purpose of effecting it. Under the circumstances of the case I cannot think that the court has been wrong in saying that Aspinwall was not entirely discharged. Considering the liability of Aspinwall to have continued, the question arises whether the bond has been wholly or in part discharged by the

(a) 2 Ves. jun. 540.

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course of payment. As between Brown and the bankers, the settlement which took place when the warrant of attorney was given, disposed of the question whether the moneys paid antecedent to the bond becoming due were to be taken in discharge of the bond, or to be applied to Brown's account current with the bankers, and Brown having acted in that settlement with the concurrence of Aspinwall, it appears to me that there is no ground to say that the payments ought then to have been taken in discharge of the bond. If it was not then discharged, I think the bankers were at liberty to consider themselves as holding the bond as one security and the warrant of attorney as another security. Another question has been raised whether the plaintiff, by reason of his having delivered up the title deeds, is bound to convey the legal estate, which was vested in Aspinwall in trust for Brown, subject to the indemnity of Aspinwall against his liability upon the bond. I cannot think that if a [*400] *man delivers up title deeds upon a fraudulent misrepresentation, he is therefore compellable to convey the legal estate which he holds as an indemnity. My opinion is that the legal estate is clothed with a trust to indemnify the plaintiff against his liability upon the bond, and cannot be taken out of his hands till that indemnity is worked out. The consequence is that this decree must be affirmed.(a)

Decree affirmed.

COLEGRAVE v. MANLEY.

1823: 28th November.

A solicitor, who has declined to proceed with a cause, will be ordered, though his bills of costs are not paid, to deliver up the papers to the present solicitor of the party, the latter undertaking to hold them subject to the former solicitor's lien, for what shall be found due to him on the taxation of the bills.

(a) The latter part of the judgment seems to have proceeded upon the supposition that the legal estate in the chambers was vested in the plaintiff; but it did not appear upon the pleadings that the plaintiff was either devisee or heir at law of Aspinwall.

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An offer on the part of the former solicitor, after the motion is made, to proceed with the cause, will not prevent the court from ordering him to deliver up the papers on the terms mentioned above.

On the 5th of August, Mr. Raphael, the solicitor of the plaintiff, wrote to him a letter, in which he said, "I have assigned over your business, with others, to Mr. Betholme, who has taken my house, and who, I doubt not, will do ample justice to your concerns."

The plaintiff declined to employ Mr. Betholme as his solicitor; and, finding that Mr. Raphael had, without his privity, delivered over the proceedings and papers connected with the cause to Mr. Betholme, he desired that they might be given up to Mr. Winter, his present solicitor. Mr. Raphael at first promised that they should be put into Mr. Winter's hands; [*401] but he afterwards refused to deliver them up till his bills of costs were paid; and the want of them was highly inconvenient to the plaintiff, by preventing the due prosecution of the inquiries which were going on in the Master's office.

Mr. Hart, for the plaintiff, moved that Mr. Raphael might be ordered to deliver up to Mr. Winter, within a week, all the proceedings, papers, &c., in his custody which belonged to Colegrave, or related to the suit, Winter undertaking to hold them subject to Raphael's lien, and that the bills might be referred for taxation on the usual terms.

Mr. Raphael, in his affidavit, stated, that it had been and was his intention to continue to superintend the business.

Mr. Treslove, against the motion:—Mr. Raphael was willing to superintend the suit, so that the client would still have the benefit of his responsibility and attention. Even if he had absolutely declined to proceed, the only order that could be made against him would be, that he should produce the papers for the use of the plaintiff, *Ammerell v. Ppynton*.(a) Papers, on which a solicitor has a lien,

(a) 1 Swanst. 1.

 1823.—*Colegrave v. Manley*.

are never taken out of his hands, till his bills of costs are paid ; at least, the sum due to him must be paid into court, before he is required to part with the papers.

THE LORD CHANCELLOR:—A solicitor cannot assign over a client, or a client's business. I formerly thought that these bargains, by which one solicitor assigns his business over [*402] to another, were contrary *to public policy. The Court of King's Bench entertained a different opinion, on the ground that the client could say, "my business shall not be so assigned." I doubt, however, whether the court, in coming to such a conclusion, recollected sufficiently the situation in which a client generally is, when a recommendation, purchased with money, is thus urged upon him.

I look upon Mr. Raphael as having dissolved the connection of solicitor and client ; for it is not enough, that he was willing to superintend the plaintiff's business. Now, where the solicitor discharges himself, the rule is quite different from what it is where the solicitor is discharged by the client. I remember, the Court of Common Pleas held, that an attorney, if he refused to go on with the business, should not recover for the part which he had done. As to requiring the party to pay the amount of the costs into court, that is a term which I will not impose ; for it is a term with which not one half of the suitors could comply. So far as the use of papers is concerned, the suitor, when his solicitor discharges himself, must have his business conducted with as much ease and celerity, and as little expense, as if the connection of solicitor and client had not been dissolved.

Mr. *Treslove*, on behalf of Mr. Raphael, now offered that Mr. Raphael should proceed with the cause.

- THE LORD CHANCELLOR:—How can Mr. Raphael now offer to proceed with the cause ? He has assigned his business. The

1823.—*Ferraud v. Pelham*.

papers must be given up to Mr. Winter, on his signing a receipt for them, and undertaking to hold them, subject to Mr. Raphael's lien.

*The order made was as follows, "His Lordship doth [*403] order that Mr. John Raphael, the late solicitor in this cause for the plaintiff, do, within a week, deliver, upon oath, to James Winter, the present solicitor in this cause for the plaintiff, all the proceedings in this cause, and all such deeds, evidences, papers and writings whatsoever, as have come into the possession or custody of the said John Raphael, belonging to the plaintiff, and which relate to this cause; the said James Winter giving a receipt to John Raphael for the said deeds, evidences, papers and writings, and undertaking to hold the same, when so delivered to him, subject to the lien of John Raphael, for the amount of what shall be found due to him upon the taxation of his bills of costs, and until such amount shall be paid to John Raphael; and the plaintiff submitting to pay to John Raphael what shall appear to be due to him on taxation of his bills of costs delivered, it is ordered, that it be referred to the Master to tax the said bills of costs, &c.," with the usual direction.

Reg. Lib. 1823, A. 151, 152.

**FERRAND v. PELHAM*.

[*404]

ROLLA.—1823: 29th November.

After a plea overruled, an order for time to answer, obtained as of course, is irregular.

To an amended bill of revivor and supplement, the defendant, having obtained an order for a month's time to plead, answer or demur, not demurring alone, put in a plea, alleging that the original cause, which the bill sought to revive, had become abated in 1805, and that no proceedings had since been had in

 1823.—*Ferrand v. Pelham*.

it. On the 3d of November, the plea was overruled, by the Vice-Chancellor.

The defendant then obtained as of course, by petition at the Rolls, an order for a month's time to answer.

The plaintiff now presented a petition praying that the order might be discharged as irregular.

Mr. *Skirrow*, for the petition, cited *Jones v. Saxby*,^(a) and referred to *Griffith v. Wood*.^(b)

Mr. *Pepys*, contra, contended that the practice always has been, that a defendant might obtain, as of course, one order for time to answer, after a plea or demurrer overruled.

Mr. *Lovat*, *amicus curiæ*, referred to the case of *Trim v. Baker*,^(c) as deciding, that, after a demurrer was overruled, it was not of course to obtain an order for time to answer.

Mr. *Pepys* answered, that, even if such a rule had been laid down by the Lord Chancellor in the case of a demurrer overruled, it did not apply to a plea. A plea was, in many [*405 *respects, considered as an answer, and had nothing in common with a demurrer.

THE MASTER OF THE ROLLS :—We have in this branch of the court, many precedents of orders for a month's time to answer, granted upon petition of course, after a demurrer or plea overruled ; and I doubt whether the Lord Chancellor was aware of the existence of these authorities, when the point now in discussion was brought before him. However, I must yield to the authority of Lord Eldon's decision, even if, when he made it, he had not the full series of authorities before him.

(a) 1 Swanst. 184.

(b) 1 Ves. & B. 541.

(c) See *supra*, 258.

1823.—*Garey v. Whittingham*.

Let the order be discharged but without costs; and let no proceedings be taken against the defendant till after next seal, in order that he may have an opportunity of making a special application for time.

The LORD CHANCELLOR afterwards gave the defendant two successive orders for time to answer; one for three weeks, and another for a fortnight.

Reg. Lib. 1823, A. 280-389.

GAREY v. WHITTINGHAM.

ROLLS.—1823: 29th November.

A party who is served with a petition, but who has no interest in the order to be made upon it, is not entitled to the costs of appearing on the hearing of that petition.

THE bill was filed by a person entitled in remainder to a residue: the defendants were Mrs. Whittingham, to whom the interest of the residue was given during her life to her separate use—her husband—and the executors.

*Mrs. Whittingham, who had answered separately [*406] from her husband, presented her petition, praying that the dividends of the fund in court might be paid to her; and an order to that effect was made.

Mr. *Belt* appeared for the husband, who had been served with the petition, and asked for costs.

Mr. *Agar*, contra, submitted that, as the husband had no interest in the prayer of the petition, and was served merely as a party in the cause, he ought not to have appeared, and, therefore, ought not to be allowed the costs of his appearance.

1823.—Garey v. Whittingham.

It was stated, by many of the bar, to be the practice, both before the Lord Chancellor and the Vice-Chancellor, to give costs to parties who were served, even though it was not necessary to have served them, or that they should appear.

THE MASTER OF THE ROLLS :—If a person is served whose appearance is not necessary, and he chooses to appear merely to ask for costs, it is the established practice here not to give him his costs. The rule is not of my making. When I first came to this seat, I thought the point of so much importance, that I consulted Sir William Grant upon it. He informed me, that, in his time, the rule was as I have stated ; and I have followed the practice which my predecessors have established, as being the most useful to the public. A contrary practice would produce an enormous and unnecessary expense.

The order recited—"Counsel for the petitioner and for the defendant John Felix Whittingham and the plaintiff this day attending, no one attending for the other parties, although they were duly served with a copy of the said petition, and [*407] *his Honor's order made thereupon :"—and it directed that the dividends should be paid to Mrs. Whittingham and that she should pay unto the plaintiff the costs of the application.

Reg. Lib. 1823, A. 104.

In many other cases, the Master of the Rolls refused costs to parties whose appearance was not necessary, but who, having been served, chose to appear.(a)

(a) After the death of Sir Thomas Plumer, the practice on this point seems to have varied.

1823.—Gretton v. Leyburne.

GRETTON v. LEYBURNE.

ROLLS.—1823: 1st December.

A bill of costs, where the amount of it has been settled between the solicitor and the client, and part of it has been paid and security given for the remainder, will not be ordered to be taxed, merely because it contains charges which would be disallowed on taxation.

Semble, an order obtained as of course for the taxation of a bill of costs, which has been settled and paid, will not be discharged for mere irregularity, without any discussion of the merits, if the petition, seeking to discharge that order, enters into the merits of the case.

MR. CHIPPENDALE had been Mr. Gretton's solicitor in a suit, which commenced in 1809, and ended in 1817: Mr. Chippendale and Mr. Gretton had likewise cash transactions with each other. On the 7th of February, 1818, Mr. Chippendale delivered his bill of costs, amounting to 2,005*l*. On the 18th of March following, a meeting took place between Mr. Chippendale and Mr. Gretton, Jun., who, his father being then very far advanced in years, acted as his father's agent. At that meeting a balance of 768*l*. was ascertained to be due to Mr. Gretton, on the cash transactions; and, debiting him with the amount of the bill of costs, the balance due from him was stated at 1,236*l*. 2*s*. 1-2*d*. The account was subscribed:

"Balanced and settled this day by us.

WILLIAM CHIPPENDALE,

WILLIAM GRETTON, for John Gretton and self."

*In July, a correspondence took place between Mr. [*408] Gretton, jr., and Mr. Chippendale, in which the former objected to items in the bill, and required to have it examined, and the latter expressed his willingness that it should be looked into. Afterwards Chippendale offered to reduce the bill to 1,200*l*.; his offer was accepted; and, on the 1st of August, the following memorandum was indorsed on the account, and signed by both parties, "The balance due on this bill was 1,236*l*. 2*s*. 1-2*d*., and, by an inspection this day, was reduced to 1,200*l*."

1823.—Gretton v. Leyburne.

In May, 1819, 600*l.* was paid by Mr. Gretton; and four bonds of the father and the son, each for 150*l.* were given to Chippendale, payable respectively at the end of one year, two, three and four years. Three of those bonds were paid; but the fourth was not paid. On the 24th of April, 1823, an order as of course was obtained for the taxation of Chippendale's bills.

Chippendale now presented a petition, going into the merits of the case, and praying that the order of the 24th of April might be discharged.

The affidavits of three professional men stated, that the bill contained many improper charges: and particular objectionable items were specified.

Mr. *Sugden* and Mr. *Norton*, for the petition, contended that, without going into the merits, it was enough to say that the bill had been settled and paid; and, therefore, an order to tax it, obtained as of course, was irregular. Even if, upon a petition regularly heard, the client could succeed in having the bill taxed, still this order must be discharged, *Clutton v. Pardon*.(a)

THE MASTER OF THE ROLLS:—A party, who pre-
[*409] sents a petition going into the merits *of a case, and desiring to have an order discharged on the ground of those merits, and who files affidavits as to the merits, which call forth affidavits in answer, cannot be permitted to say "I have a preliminary objection in point of form, which makes it unnecessary to go into the substance of the case." If the solicitor meant to rely on the alleged irregularity of obtaining such an order, as of course, he ought to have presented a short petition confined to that point.

Mr. *Sugden* and Mr. *Norton* insisted on the settlement of the bill of costs, by a person duly authorized to act for Mr. Gretton,

(a) *Sup.* 361.

 1822.—*Gretton v. Leyburne*.

and the long acquiescence in that settlement, and also on the payment that had been made, and the securities that had been given, in pursuance of it. Under such circumstances, it was in vain to point out particular items of charge, which might be too high, unless the over-charge was so gross as to amount to fraud.

Mr. *Horne* and Mr. *Rose*, contra:—The client was not personally a party to any one of the dealings, which the solicitor relies upon as a bar to the taxation of his bill.

The transaction, which took place on the 18th of March, 1818, does not amount to a settlement; for there was at that time no examination of the bill of costs, nor production of vouchers, though an account was settled in which that bill formed an item: and, accordingly, in the subsequent correspondence, the demand for costs is treated as still open to examination. The bill, therefore, was an unsettled bill on the 31st of July; and the deduction of a gross sum from it on the 1st of August, by which the balance was reduced to 1,200*l.*, but not accompanied by any *examination of items, cannot give it a more binding character. The subsequent payment, and the delivery of the bonds were extorted by the apprehension of arrest. Nothing, therefore, has occurred, which will preclude the taxation of the bill, if we can show particular items of improper charge. We have done so; the evidence which we have given of the extravagance of many of the charges contained in the bill of costs, is decisive: and, in cases of this kind, a court of equity infers fraud from extravagance of charge.

The following cases were cited: *Langstaffe v. Taylor*,^(a) *Penderleath v. Fraser*,^(b) *Crosseley v. Parker*.^(c)

THE MASTER OF THE ROLLS:—It was contended that the order for taxation ought to be discharged on the simple ground, that it had been obtained as of course, after the bills sought to

(a) 14 Ves. 263.

(b) 2 V. & B. 174

(c) 1 Jac. & W. 460.

1823.—Gretton v. Leyburne.

be taxed had been settled, and payment of them either made or secured. I thought it more consonant to justice, as both parties had entered into the merits, to hear those merits just as if a new petition for taxation had been presented, and finally to determine the point in dispute. If the present petitioner had failed upon the merits, and I had thought it right upon the affidavits before me to make a new order referring his bills for taxation, it would not have followed, that the former order might not have been discharged at the same time that such new order was made.

On those merits, this does not appear to me to be a case in which the party is entitled to have the bill taxed. The right of a client to have his solicitor's bill taxed, though a right which is to be favored in a court of justice, may be waived; and the whole point, in many of the cases is, do the circumstances of the dealings between the parties amount to a waiver of that right?

Work and labor done by an attorney is like work and [*411] *labor done by any person of a different class; there is no particular rule for judging what is final settlement with respect to a bill of costs more than in any other species of demand—save only that the court throws round the client a considerable degree of protection, so that none of the ordinary acts, which in common matters might operate as a sort of settlement, shall preclude the client from having the items of the charge examined.

The bill of costs, though not delivered till February, 1818, commenced in 1809; the solicitor and the client had other dealings, and there was a cash account depending between them. In March, 1818, a settlement took place of the cash transactions, when on them, a balance of about 768*l.* was found to be due to Gretton. Against this, there was a set-off of the bill of costs, charges and expenses, amounting to about 2,005*l.*, which had been delivered some weeks before. The two accounts are settled together; a balance of 1,236*l.* is ascertained to be due to Chippendale; and Mr. Gretton, Jun., signs the account, ascertaining this balance, as balanced and settled. Much has been said with

1823.—Gretton v. Leyburne.

respect to the advanced age of Mr. Gretton, who was then about ninety years old; but the settlement was made through an authorized agent; the son settled the account current, and there is no attempt to dispute it. If he was competent to settle the one, why should he not be competent to come to a settlement with respect to the bill of costs?

It is contended, that what took place in March, 1818, cannot be regarded as a settlement of the bill of costs, because it had not been preceded by a regular examination of the items, and because it was followed by communications between the parties, which showed that they considered the charges as still the subject of discussion. But, in the first place, an interval had elapsed from the delivery of the bill long enough to enable the client to look into *the reasonableness of the charges; [*412] and next, supposing that Mr. Chippendale voluntarily let him in to examine the account, what is the effect? Mr. Gretton has an opportunity given him to examine the items, and to consult professional men: and the result is, that he and his solicitor come to a compromise; 36*l.* is deducted; and it is agreed that the balance shall be settled at 1,200*l.* It was argued, that the deduction of 86*l.*, being made in gross, and not on account of particular items, could not be regarded as a settlement. But—when objections are taken to an account, and one party proposes, and the other party consents to the proposal, that in order to avoid the discussion of particular items, a gross sum shall be deducted—when the deduction is accordingly made, and the balance ascertained to be of a given amount; the account, which has been so dealt with, must be considered as settled.

The transaction does not stop at this point. In May, 1819, after Gretton had had full time to consider what had been done, bonds, payable by instalments, at distant periods, are given for the balance due to Chippendale. It is said, that this was done to prevent an arrest; such an allegation may be made in every case; and there is here no evidence that Mr. Chippendale used any threats. Nay, three of the bonds are paid; and it is only

1823.—Barker v. Lea.

when the last becomes due, that an application is made to have the bills taxed.

Probably many of the items in the bills would be disallowed by the Master; but that is not enough, after such dealings, to give the party a right to have the bills taxed. Items which would be disallowed, do not amount to that fraud which must be made out, in order to subject to taxation bills that have been so settled.

The order for taxation was discharged with costs.

[*413]

*BARKER v. LEA.

ROLLS.—1823: 2d December.

A testator bequeaths the residue of his property to his nephews and nieces, on their respectively attaining twenty-five, with a direction that his trustees shall, in the meantime apply the profits to their maintenance; but in case of the death of any of them unmarried and without issue, he gives the shares of those so dying unto the survivors equally, to be paid at the same time with their original shares; first a nephew and then a niece die, under twenty-five, unmarried and without issue: the whole residue is divisible among the survivors who attain the specified age, and the niece does not, upon the death of the nephew, acquire, under the clause of survivorship, a vested interest in her proportional part of his share.

A TESTATOR by his will, after giving legacies to his brothers and sisters therein named, bequeathed all the residue of his estate, as well real as personal, "unto all and every the child or children of my brothers and sisters aforesaid who shall be living at the time of my decease, on their, his, or her respectively attaining the age of twenty-five years, in equal shares; but in case of the decease of any of the aforesaid brothers and sisters, leaving issue born in wedlock, then the child or children to have and enjoy the same share as if the parent had been living at the time of my decease; the principal of all such moneys to be employed

1823.—*Barker v. Lea*.

by my said executors and trustees, and the survivors of them in such way, as they, in their discretion, think most advantageous, and the profits and produce of my said residuary property to be in the meantime laid out and applied by my said executors and trustees, and the survivor and survivors of them, for and towards their maintenance, education and support equally, until they respectively attain the age of twenty-five years as aforesaid: and in case of the death of any or either of them unmarried and without issue, then I give and bequeath the part or share of him, her, or those so dying without issue, unto the survivor and survivors of them equally, share and share alike, and to be paid to them respectively at the same time along with their own original shares."

Richard Bousfield Sims, one of the class of children to whom the residue was given, died unmarried and without issue before he attained twenty-five; and afterwards Sophia Maria Bousfield, another of that class of children, died under twenty-five, unmarried and without issue.

*The only question argued, was, whether that portion [*414] of the share of Richard Bousfield Sims, which, on his death, survived to Sophia Maria Bousfield, became a vested interest in her, and was transmitted to her personal representative; or whether, upon her death, the whole survived, and not merely her original share, to the other residuary legatees.

. Mr. *Horne*, for the plaintiffs, argued that the whole of the fund continued divisible among the surviving nephews and nieces, and that no interest, whether original or accrued, vested in any of them till they attained twenty-five.

Mr. *Shadwell*, contra:—In *Pain v. Benson*,^(a) Lord Hardwicke says, "where a man gives a sum, suppose 1,000*l.*, to be divided among four persons as tenants in common, and that, if one of

(a) 3 Atk. 80.

 1823.—*Barker v. Lea*.

them die before twenty-one or marriage, it shall survive to the other; if one dies and three are living, the share of that one so dying will survive to the other three; but if a second dies, nothing will survive to the remainders but the second's original share, for the accruing share is as a new legacy, and there is no further survivorship." And, though in that case he decided that the accrued, as well as the original shares went over, he proceeded upon the manifestation of intention which appeared from the particular provisions of the will. The words, "in case of the death of one of them unmarried and without issue, I give the share of him, her, or those so dying unto the survivors equally," are a direct and immediate gift to the persons, who, at the time of such death, answer the description of "survivors." The share, therefore, which, upon the death of the nephew, accrued to Sophia, was a vested interest in her; and there are no words, [*415] which, upon her *death, could carry it away from her personal representatives, and over to the other nephews and nieces.

Mr. *Wingfield* and Mr. *Wray*, for the trustees

Budge v. Barker,(a) *Worlidge v. Churchill*,(b) *Ferguson v. Dunbar*(c) and *Wilmot v. Wilmot*,(d) were cited.

THE MASTER OF THE ROLLS:—Where distinct legacies are given with survivorship, the general rule is, that the clause of survivorship, unless extended by particular words, attaches only to the original shares and does not affect the accruing shares, which therefore become vested in the individuals who are the survivors for the time being. That rule is recognized by Lord Hardwicke, in *Pain v. Benson*; and subsequent cases, though they have introduced exceptions, have not broken in upon it. The principal exception is, where the disposition is not of separate legacies, but of one aggregate fund, which the testator meant

(a) Ca. Temp. Talb. 124.

(b) 3 Bro. C. C. 469, in the note.

(c) 3 Bro. C. C. 465.

(d) 8 Vesey, 10.

1823.—Barker v. Lea.

should remain an aggregate fund, and should not be broken into fragments, if some of the persons to whom interests in it were given, happened to die.

Now, in this case, the testator is disposing of an aggregate fund; he speaks of the residue as one mass, and there is nothing in the will which leans towards the idea of separate subdivision. He directs his trustees to "employ the principal of all such moneys in such way as they think most advantageous, and to apply the profits towards the maintenance of the children, until they respectively attain twenty-five;" plainly intimating, that, notwithstanding *intermediate deaths, the [*416] aggregate fund was to remain entire, till it were seen who were the persons entitled to it. If any child died under twenty-five, there was nothing which, correctly speaking, could be said to go from that child to the survivors; for, in that event, such child was not entitled to any interest in the fund. After attaining twenty-five, the child took a vested interest in his share, and such share could not afterwards survive. My opinion, therefore, is, that the survivors take the whole of the residue.

The only objection to this construction is, that it gives no effect to the words, "In case of the death of any or either of them unmarried, and without issue, then I give or bequeath the part or share of him, her, or those, so dying without issue, unto the survivor and survivors of them, equally share and share alike, and to be paid to them respectively at the same time along with their own original shares." If the first part of the will had been ambiguously expressed, I should have thought that these words afforded a strong ground for contending that the original shares were vested interests, though not payable till twenty five. But the words "on their, his, or her respectively attaining the age of twenty-five years," are annexed to the substance of the bequest. The gifts were contingent; and, in the events which have happened, nothing vested in Richard Bousfield Sims and Sophia Maria Bousfield.

 1823.—James v. Parnell.

The decree declared "That the original share of Sophia Maria Bousfield, in the residuary estate of the testator, and also the share which survived to her on the death of Richard Bousfield Sims, did, upon her death, survive to, and become divisible among the surviving nephews and nieces of the testator, who were living at the time of his death."

Reg. Lib. 1823, A. 123.

 [*417]

*JAMES v. PARNELL.

ROLLS.—1823: 2d December.

Proof of the handwriting of an attesting witness to a will, received under particular circumstances in order to found a decree establishing the will.

THE only question in the cause was, whether the will was so proved that the court could establish it.

The testator had been dead about twenty-five years.

Two of the attesting witnesses proved the execution of the will, and the handwriting of the third attesting witnesses. That witness was described as a servant of a Mr. Parnell; and, upon inquiries being made of a nephew of Mr. Parnell, who had succeeded to the property of that gentleman, the answer was, that nothing had been heard of the witness for a great number of years. No inquiry had been made of the family of the witness, as it was not known who his relations were.

Mr. *Shadwell*, Mr. *Roupell* and Mr. *Wakefield* for the different parties.

Powell v. Cleaver,^(a) *Lord Carrington v. Payne*,^(b) *Bernett v. Taylor*^(c) were cited.

The MASTER OF THE ROLLS was of opinion that the proof was sufficient, and made a decree declaring the will to be well proved.

(a) 2 Bro. C. C. 503.

(b) 5 Vesey, 404.

(c) 9 Vesey, 381.

1823.—*Ronalds v. Feltham*.

*RONALDS *v.* FELTHAM.

[*418]

ROLLS.—2d December.

A testator, having first directed all his debts to be paid, bequeaths all his copyhold estates, and all his property whatsoever, to his wife, during her life, and after her decease to his surviving children, and appoints A. and B. his executors: the debts are charged on the copyhold estate.

THE last will of George Sponge, dated on the 29th of October, 1821, and not attested so as to pass real estates, was in the following words:

"First, I direct all my just debts and funeral expenses to be fully paid and satisfied; I give and bequeath unto my wife, Elizabeth Sponge, all my copyhold, freehold and leasehold estates, lying and being in Egham, with every appurtenance thereunto belonging, and all my property, stock in trade, furniture and book debts whatsoever and wheresoever, to hold to the said Elizabeth Sponge for her natural life, and, after her decease, the said property and estates to be divided between the surviving children of me, George Sponge, I nominate, constitute and appoint George Feltham and Joseph Sadler, executors in trust of this my will."

The personal property of the testator was not sufficient to pay his debts. He had no freehold estates; but he had a leasehold which had been sold by his executors for a trifling sum, and a copyhold messuage of the value of about 800*l*.

The bill filed by the creditors prayed that so much of the real estate might be sold as should be necessary for the payment of the testator's debts.

The devisees insisted that the debts were not made a charge on the copyhold.

1823.—*Ronalds v. Feltham*.

Mr. *Purvis*, for the creditors, cited *Clifford v. Lewis*(a) and *King v. Dennison*.(b)

[*419] *Mr. *Jeremy*, for the devisees, cited *Williams v. Chitty*(c) and *Powell v. Robins*.(d) The words were not sufficient to charge the real estates in any cases; least of all, could they charge a copyhold, which was specifically devised.

Mr. *Ludlow* for the executors.

THE MASTER OF THE ROLLS:—If the disposition of the property is to be construed in the way contended for by the devisees, no fund would be left for the payment of the debts; for the bequest to the wife and to the children comprises everything that belonged to the testator. He must have meant them to take the whole, subject to the payment of his debts; for, if that was not his purpose, what part of the property did he mean them to take, so subject? He has blended all his real and personal estate into one fund, which he gives to his wife for life, and after her death to his children; but he has previously directed that his debts should be first paid. Until these debts were paid, it could not have been his intention that the subsequent disposition should take effect.

It was said in the argument that the word “first” in this will was nothing more than the ordinary technical form of introductory words. In reference to that suggestion, I have to observe that here it is not followed by other words denoting succession, such as secondly, thirdly, &c.

The copyhold is charged with the payment of debts.

(a) 6 Mad. 33.

(b) 1 Ves. and Bea. 260.

(c) 3 Ves. 545.

(d) 1 Ves. 209.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY,
COMMENCING IN THE
SITTINGS BEFORE MICHAELMAS TERM,
3 GEO. IV., 1822.

*COLLYER v. DUDLEY

[*421]

ROLLS.—1823: 25th November.

If an agent does not render his accounts within a reasonable time, he must bear the costs of a suit instituted to have the accounts taken; and it will not be any excuse for him, that he offered to pay on account a gross sum, which, it turns out, would have covered all that was due from him.

THE bill was filed by one of two executors, praying an account against the defendant Dudley, who had been the solicitor and agent of the testator. The other executor, having declined to concur in the suit, was made a co-defendant.

The testator died in 1816; and from that time frequent applications had been made to Dudley to render his accounts; but no accounts were rendered; and the only reason assigned for the delay was the pressure of business. In 1821 the bill was filed; before the answer was put in, Dudley offered to pay the executors 500*l.* on account of what might be coming due from him; and on the result of the account, as afterwards taken in the Master's office, it appeared that 500*l.* was fully equal to the sum for which he was accountable at the time of the offer made.

1823.—Sumner v. Powell.

[*422] *The only question was as to the costs of the suit.

THE MASTER OF THE ROLLS :—Any person, and more especially a professional gentleman, who places himself in the situation of an agent collecting and disbursing moneys, ought to be ready with his accounts. Suspense as to the actual state of the balance is most injurious to the principal. For upwards of four years repeated applications were made to Mr. Dudley for his accounts; but no accounts were rendered. It is no answer to this case of neglect and delay, that he offered to pay on account a gross sum, which, it now appears, would have covered all that was due from him; for, besides that the offer was not made till after the bill filed, the executors had a right to have the accounts rendered to them, as well as the balance paid. The delay of Mr. Dudley rendered the suit necessary; and he must pay the plaintiff's costs.

The executor, who is a co-defendant, cannot have his costs, he ought to have concurred as a plaintiff.

[*423]

*SUMNER v. POWELL.

1823: 3d December.

The representative of a deceased partner, the account between him and the partnership being at the time unsettled, agrees with the surviving partners to assign to them all his interest in the concern, upon being paid a certain sum of money, and having an indemnity against all claims upon the partnership; the assignment is executed, the money paid, and a joint covenant of indemnity given by the surviving partners: Held, that the covenant is not to be considered in equity as a joint and several covenant.

THE facts of this case are fully stated in the report upon the hearing of the cause before Sir William Grant, by whom the bill was dismissed.(a) The plaintiff having appealed from the decree dismissing the bill,

(a) 2 Mer. 30.

1838.—Sumner v. Powell.

The LORD CHANCELLOR this day delivered the following judgment upon the appeal :

I have doubted much whether the decision of Sir William Grant in this case was right ; but, upon considering the case, it appears to me at present that his judgment ought to be supported. The late Mr. Sumner was a partner in the banking-house of Castell, Powell & Co. ; that partnership from time to time admitted new members, and, during its existence, two gentlemen, being trustees of a sum of stock of between 5,000*l.* and 6,000*l.*, executed a power of attorney to the house, enabling them to receive the dividends upon the stock ; the power of attorney, either from its being so intended by the parties, or from want of attention on their part, authorized a transfer of the stock ; and the fact is, that Powell, one of the partners, did transfer the stock, and apply the money arising from the transfer to the use of the banking house, from time to time leading the parties interested to believe that the stock was still standing in the names of the trustees, by paying them the dividends as they became due till the failure of the banking house. Before that event happened the late Mr. Sumner died, *and the plaintiff [*424] became his personal representative. It is quite clear that under these circumstances, the banking house being debtors by the receipt of the money arising from the sale of the stock, the trustees and *cestui que trusts* became entitled to proceed, not only against the surviving partners, but against the assets of the deceased partners, till their demand was made good. After the death of the late Mr. Sumner, the plaintiff, not wishing to continue in the concern, came to an arrangement with the surviving partners, by which he was to be paid two sums of 1,500*l.* and 2,750*l.*, and to have an indemnity against all claims upon the partnership, assigning to the surviving partners all his interest in the concern. How the accounts would have stood between the plaintiff, as the representative of the late Mr. Sumner, and the surviving partners, if this arrangement had not been come to I cannot tell ; but such an arrangement as I have stated was made, and then, of course, if proper care had been taken, the plaintiff

1823.—*Sumner v. Powell*.

would have had not only an indemnity, but a full and effectual indemnity. The indemnity taken however was the joint covenant of the partners who remained in the concern, and not their joint and several covenant. Demand being afterwards made in this court, it turned out that the plaintiff, as the representative of the late Mr. Sumner, was compelled to pay a considerable sum of money on account of the produce of the stock sold out, and by this bill he claims, against the representatives of the deceased partners, to be indemnified under the effect of the joint covenant. The case on his part was rested on the ordinary doctrine of this court, that where there has been an antecedent joint debt due from the parties to a joint obligation, this court considers the obligation as joint and several, and pursues the assets of deceased debtors until the demand is satisfied. The Master of the Rolls was well prepared to give judgment in this [*425] *case, the subject being one of which he had acquired very extensive knowledge. What he says is, that where there is no antecedent debt or antecedent liability, a party taking a joint covenant or a joint indemnity must abide by it; that a court of equity gives no more relief in such cases than a court of law does; and that there being in this case no antecedent liability to indemnify him, the plaintiff must abide by his joint covenant, and can only go against those against whom he has a remedy at law. The question is, whether it is so or not. I confess I have felt a strong opinion that it was difficult to distinguish this case from the case of antecedent debt, looking at the plaintiff as buying his indemnity by taking it in discharge of what was due to him from the partnership. The question will be, therefore, whether the case is not reduced to this—that in order to get rid of all sorts of difficulties, the surviving partners said to the plaintiff, there is an account between us, take the 4,250*l.*, take the indemnity, and let us have nothing more to do with it. If that was the case, it comes to the question which the Master of the Rolls has considered. That appears to me to have been the case, and, therefore, I do not see any ground to disturb this judgment. There can be no doubt in the world that if this covenant had been a joint and several covenant it would have done, and, there-

1823.—Coope v. Twynam.

fore, any evil which might otherwise arise out of the case, may be avoided by the addition of a single word. I do not think that any case can be found, in which, where a joint obligation has survived, it has been carried into effect against the assets of a deceased obligor in a case of indemnity.

Decree affirmed.

*COOPE v. TWYNAM.

[*426]

1823: 28th and 29th July, and 3d December.

Where sureties are bound by different instruments for equal portions of a debt due from the same principal, and the suretiship of each is a separate and distinct transaction, there is no right of contribution between them.

THE bill in this cause, amongst other things prayed, that a bond, which had been executed by the plaintiff and John Brice deceased, for securing to the defendant Twynam the sum of 400*l*. and interest payable on the 24th of December, 1814, might be delivered up to be cancelled, and for an injunction in the meantime to restrain proceedings at law upon the bond.

The principal case stated by the bill in support of the relief prayed respecting the bond was, that in August, 1812, the plaintiff and William Rogers and William Purdue Smith respectively agreed to become security with the said John Brice for the payment to the defendant Twynam of such sum of money, not exceeding 1,200*l*., as Brice might be found indebted to Twynam upon the settlement of an account then depending between them; that it was agreed that such security of the plaintiff and Rogers and Smith respectively should be given by three several bonds payable with interest, at different periods, that is to say, one bond from Brice, and Smith as his surety, for the payment of 400*l*., and interest, on the 24th of December, 1813; another bond from Brice, and the plaintiff as his surety, for the payment of 400*l*. and interest, on the 24th of December, 1814; and another bond from Brice and Rogers as his surety, for the payment of

1823.—Coope v. Twynam.

400*l.*, and interest on the 24th of December, 1815; that Brice and Twynam accordingly caused three several bonds to the effect aforesaid to be prepared, and that the plaintiff and Rogers respectively executed the bonds in which they were
[*427] *respectively named as sureties, but that Smith declined to execute the bond in which he was named as surety, or to carry the agreement with Twynam into effect. The bill charged, that the execution of the bonds was one entire agreement, and that as Smith did not execute the bond in which he was named as surety, the plaintiff was not bound by the bond which he had executed; and it further charged, that the bond executed by the plaintiff was executed by him upon the faith and expectation that Smith would execute his bond, and that Brice would thereby be relieved from the payment of the 1,200*l.* to Twynam, until the bonds should respectively become payable.

The defendant Twynam, by his answer, said that in August, 1812, Brice was indebted to him in the sum of 1,364*l.* or thereabouts, upon the balance of an account which was then depending between them, and that being pressed for payment of the balance, Brice proposed to give security for 1,200*l.* part thereof, and offered as such security the three several bonds mentioned in the bill. He further said, he believed that the plaintiff and Rogers, each of them alone and separately from the other, agreed to become bound with Brice for the payment of 400*l.* to him, the defendant, without any reference to the settlement of accounts between him and Brice, and without the plaintiff and Rogers becoming sureties or liable for the default of each other, or of Smith; and he said he believed, that for the purpose of giving the aforesaid security, the plaintiff for himself alone, and without any privity or connection with Rogers or Smith, agreed to join Brice in a bond for the payment of 400*l.* and interest on the 24th of December, 1814; and Rogers, in like manner, agreed to join Brice in a bond for the payment of 400*l.* and interest upon the 24th of December, 1815; but he said he did not believe
[*428] *that Smith ever agreed to join Brice in a bond for the payment of 400*l.* and interest on the 24th of December,

1823.—*Cooper v. Twynam.*

1813, although, at the time when the other bonds were executed, Brice had induced him to believe that Smith would execute such a bond. He admitted that the three bonds were prepared by his solicitor (who, he said, acted on that occasion as the solicitor of Brice), and that the plaintiff and Rogers respectively joined with Brice in the bonds in which they were named as co-obligors with him; and that Smith declined on his part to execute the bond in which he was named as co-obligor with Brice, and he insisted that, notwithstanding Smith did not execute that bond, the plaintiff was bound by the bond which had been executed by him. He denied that the execution of the bonds was one entire agreement, and said that he did not believe that the plaintiff executed the bond in which he had joined, upon the faith and expectation that Smith would execute the other bond, and that Brice would thereby be relieved from the payment of the 1,200*l.* until the bonds should respectively become payable.

Mr. Hart and Mr. Koe moved for the injunction upon the merits confessed by the answer, and in support of the motion argued, that if the arrangement had been that Brice should give a bond for 1,200*l.* with three sureties, and one of the sureties had declined to execute the bond, neither of the others would have been liable. That the same principle which applied to the case of an arrangement for three sureties joining the principal debtor in one bond, must apply to the case of an arrangement for three sureties joining the principal debtor in several bonds. That in each instance it was merely the case of three persons agreeing to become sureties for the principal debtor, and two only *becoming such sureties. They cited *Dering v. [429]* *Lord Winchelsea*(a) and *Underhill v. Horwood*.(b)

Mr. Sugden and Mr. Romilly for the defendant, relied upon the fact of the sureties having entered into several and distinct obligations as an answer to the motion.

THE LORD CHANCELLOR:—These cases of sureties depend

(a) 1 Cox, 818.

(b) 10 Ves. 202.

 1823.—*Horner v. Swann.*

upon nice distinctions in point of fact; *Dering v. Lord Winchelsea* settled, that if three persons became sureties for 12,000*l.*, each in a separate bond for 4,000*l.*, there would be a right of contribution between them. That case was much doubted in Westminster Hall at the time it was decided; but I believe, upon consideration, it will be found to be quite right. In that case it was said by the sureties, we will each give a bond for 4,000*l.*, but beyond that we will not be liable; it was held, however, that there was a liability between them as co-sureties. The present case depends upon the question, whether this was really a separate and distinct transaction, or the same transaction split into different parts. If the case of *Dering v. Lord Winchelsea* be right, and there was an agreement that A., B. and C. should become liable for 1,200*l.*, each in a bond for 400*l.*, there would be a right of contribution between them; and then it would be a question whether, if the bonds were not given by all, they would be obligatory upon any? That would depend upon nice distinctions. It might be waived by subsequent transactions.

December 3d.—The LORD CHANCELLOR said, that he considered the bonds in this case as distinct obligations, and that it was impossible to apply the doctrine in *Dering v. Lord Winchelsea*.

Injunction refused.

 [*430]

**HORNER v. SWANN.*

ROLLS.—1823: 8th December.

A tenant for life, with a power of appointing the property by will to all or any of the testator's children, may release or extinguish the power.

WILLIAM HORNER being seised of the premises in question, subject to a joint power of appointment by him and his father, which was not exercised, devised to Mansfield and Holloway and their heirs, all his real and personal estate, to hold the same unto the use of them, their heirs, &c., upon trust, "to permit his

1823.—*Horner v. Swann.*

wife Elizabeth Horner, to use the same for her use, and for the purpose of maintaining his children until they should attain the age of twenty-one, and during her life in case she should so long continue his widow; and after her decease, then for such or all of his children and their respective lawful issue, and for such estates," &c., as his wife by her last will, or by any writing purporting to be her will, &c., should give, devise and bequeath the same; and in default of such will, in trust for all and every his children living at his decease, or born in due time afterwards, and their heirs, &c., respectively, share and share alike; but if any of them died under twenty-one, without leaving lawful issue, then in trust, as to the share or shares of such child or children, for the survivors or survivor, and their respective heirs, &c., share and share alike. He subsequently directed, that in case his wife should marry again, the trustees should convey and assign to each of his children successively, upon their respectively attaining the age of twenty-one, so much of the real and personal property as would amount to his or her equal share thereof; and in case any of his children should die after his wife should marry again, and leave lawful issue, he gave to the use of the said issue, their heirs, &c., *the same proportion of his [*431] real and personal property as their father or mother would have been entitled to, in case he or she had lived to attain twenty-one; but in case any of his children should die, after his wife should marry again, without leaving lawful issue, he directed that the share of such child should go the survivor.

The testator left a widow and four children, all of whom attained twenty-one. One of them died subsequently, leaving her eldest brother her heir at law. The widow and the three surviving children contracted to sell the devised estate; and the bill was filed by them for the specific performance of the contract.

The purchaser, by his answer, submitted that the plaintiffs could not make a good title by reason of the widow's power of appointing by will, and of the contingent interests given to the issue of the children.

1828.—*Horne v. Swain*.

Mr. *Sugden* and Mr. *Sidebottom*, for the plaintiffs :—The question is whether the wife's power can be released or extinguished. It is not a power simply collateral, but is a power in gross, and is, therefore, capable of being destroyed by the donee; and the circumstance, that it is to be exercised in favor of a limited class of objects, namely, the children or their issue, does not alter its nature. The point, though once regarded as liable to doubt, must now be considered as settled; for it was expressly decided in *Smith v. Death*.(a)

Mr. *Cooper*, contra :—It has hitherto been considered a very doubtful question, whether such a power, as is here given [*482] to the *widow, can be destroyed. "Lawyers of great eminence," says a text writer, "have been of opinion, that a power to a tenant for life, to appoint the estate among his children, is a mere right to nominate one or more of a certain number of objects to take the estate; and that, consequently, it is merely a power of selection, and cannot be barred by fine."(b) In *Jesson v. Wright*,(c) Lord Redesdale says, "how can a man, having a power for the benefit of children destroy it?" *Tomlinson v. Dighton*(d) leans towards the same conclusion. The solitary decision in *Smith v. Death* cannot be considered as determining the point so conclusively, that the court will compel a purchaser to accept a title like this.

THE MASTER OF THE ROLLS :—The Vice-Chancellor has given a solemn opinion upon the point; and his decision has been acquiesced in. I shall therefore, follow it.

As to the second point raised by the answer, it was admitted, that upon the true construction of the will, none of the limita-

(a) 5 Mad. 371.

(b) *Sugden on Powers*, 73 5th edition.

(d) 1 P. Wms. 149.

(c) 2 Bligh, 15.

 1823.—*Courtoy v. Vincent*.

tions over could take effect, when all the children had attained twenty-one.

. Decree for specific performance.

Reg. Lib. 1823 A. 466.

**COURTOY v. VINCENT*.

[*433]

ROLLS.—1823: 10th December.

A testator directs his executors and trustees to pay certain annuities and legacies, "clear of the property tax, and all expenses attending the same;" the legacy duty ought to be paid by the executors out of the assets of the testator, and the annuitants and legatees are entitled to receive the full amount of their respective legacies and annuities, without any deduction in respect of legacy duty.

THE testator, by his will dated the 28th of May, 1814, gave various annuities and legacies; and he requested "that his executors and trustees would pay all such annuities and legacies as aforesaid, clear of property tax and all expenses whatsoever attending the same."

A petition was now presented, praying that the amount of certain sums, which the executors had retained out of the legacies and annuities, and applied in discharge of the legacy duty, might be paid to the annuitants and legatees.

Mr. *Horne* and Mr. *Knight*, for the petition, cited *Barksdale v. Gilliatt*,^(a) to show that the executors ought to pay the legacy duty, and that the annuitants and legatees were entitled to receive the full amount of the benefits given them by the will, without any deduction in respect of legacy duty.

Mr. *Pemberton*, 'contra:—The words "clear of the property tax" cannot be construed to mean "clear of the legacy duty;" the property tax did not arise till the legacy duty was paid.

(a) 1 Swanst. 562.

 1823.—*Ex parte Vaughan*.

The words "clear of all expenses attending the same," may mean either clear of all expense attending the property tax, or clear of all expense attending the legacies and annuities; but on [*484] neither construction can *the payment of the legacy duty be considered as an expense within the meaning of that phrase. The payment of the legacy duty is a burden thrown on the executor, and the Act of Parliament directs him to retain the amount out of the bequest.

The MASTER OF THE ROLLS was of opinion that the intention of the testator was to give the legacies and annuities free from legacy duty, and made an order accordingly.

Reg. Lib. 1823, A. 117, 118.

EX PARTE VAUGHAN.

1823: 26th March, 2d August and 11th December.

Tenant of lunatic's estate relieved against an ejectment founded on a forfeiture by breach of covenant to repair.

THIS was the petition of a tenant of the lunatic's estate, praying that the committee might be restrained from proceeding in actions of ejectment, brought against the petitioner and his under-tenants, for the recovery of the demised premises, in pursuance of orders made in the lunacy.

The petition, after stating the leases to the petitioner, which contained the usual covenants on his part for payment of the rent, and for repairing the premises within three months after notice given by the lessor, and also a covenant by the lessor to find sufficient rough timber for the repairs, and a proviso for re-entry on non-payment of the rent or breach of the covenants, proceeded to state, that notice having been given to the [*435] petitioner *to repair the premises, he had applied to

1823.—*Ex parte Vaughan*.

committee to furnish rough timber for that purpose, but the that no rough timber had ever been furnished; that the petitioner was nevertheless proceeding to repair the premises, which he had been prevented from doing before by the insolvency of an under-tenant; that the rent had been paid up to midsummer, 1822, and that the premises had not suffered any injury or become less valuable on account of the delay which had taken place in making the necessary reparations; that the actions of ejectment were brought on account of breaches of the covenants to repair, and of the provisoes for re-entry contained in the leases, and that the petitioner was advised that he had no valid defence at law to the actions; but that he was willing to make all the repairs upon the premises which should be thought necessary, and to pay all the costs which had been incurred on account of the breaches of covenant.

It appeared that the notice to repair was given in January, and that the petitioner's application for the timber was not made till July.

Mr. *Hart* and Mr. *Haldane* in support of the petition:—Admitting that courts of equity will not relieve against a forfeiture of this kind, your Lordship, sitting in lunacy, is bound to consider what, under the circumstances of the case, the lunatic himself would have done. The lunatic probably would not have taken advantage of the forfeiture. The only question is, whether the tenant has entitled himself to indulgence. It will be most mischievous to the estates of lunatics to permit covenants of this nature to be acted upon with too much severity.

*Mr. *Shadwell*, against the petition, relied upon the [*436] general rule of courts of equity not to relieve against a forfeiture, except where it admitted of a compensation merely pecuniary, and cited *Reynolds v. Pitt*.(a)

THE LORD CHANCELLOR:—There are forfeitures arising from

(a) 19 Ves. 134.

1828.—*Ex parte Vaughan*.

breaches of covenant against which courts of equity cannot relieve, but which a judicious landlord would not take advantage of. The case which has been cited will not apply if the question is whether this is a case, in which the landlord, acting for himself, would not have taken advantage of the forfeiture; care must be taken not to get rid of a good tenant by being too strict.

August 2d.—The petition being mentioned again, the Lord Chancellor said, that where a man filed a bill for an injunction to be relieved against the effect of his own conduct, the court would not, in general cases, relieve him; but that it would be an administration in lunacy extremely prejudicial to the estates of lunatics, if too hard measures were adopted with the tenants. His Lordship directed a statement to be made by affidavit what repairs were wanted to be done; and a surveyor's report having been shortly afterwards obtained upon the subject, the petition was ordered to stand over, and the repairs mentioned in the report to be completed in the meantime.

December 11th.—The repairs mentioned in the surveyor's report having been completed, it was ordered, that the petitioner should pay the committee of the lunatic's estate the rents of the several estates and premises in the possession of the petitioner [*487] belonging to the lunatic up to *Michaelmas last, together with interest upon the rents of the premises for the recovery whereof actions of ejectment had been brought, at the rate of 5 per cent. per annum, from the period at which such rents were reserved and made payable by the several leases granted to the petitioner; that the petitioner should also pay the committee of the lunatic's estate, and the next of kin of the lunatic, all the costs, charges and expenses which they had incurred, or been in any manner put unto, in consequence of the non-performance of the covenants as to repairs contained in the said leases, and of the several petitions and inquiry before the Master, and of the actions of ejectment mentioned in the petition, and of that application and consequent thereon, including the costs and charges of the several persons employed by the committee to

1823.—*Tomlin v. Beck*.

survey and examine the premises, and the state and condition thereof; and thereupon it was ordered, that all further proceedings in the said actions of ejectment, or otherwise in respect of the said breaches of covenant should be stayed.

**TOMLIN v. BECK*.

[*488]

ROLLS.—1823: 11th December.

A person, who is permitted by an executor to possess himself of part of the assets of a testator, and who, after the executor's death, and when there is no legal personal representative either of the testator or of the executor, retains the assets, and acts in the execution of the trusts of the will, is not executor *de son tort* to the original testator.

JOHN SOUTHWELL, by his last will, gave some small annuities, and bequeathed the residue of his property to his grandchildren. He died in 1763, leaving nine grandchildren; and his will was shortly afterwards proved by John Court and John Beck, two of the persons whom he had named executors. In 1799, the last of the annuities given by the will expired. John Beck, the survivor of the two executors, died, in 1800, intestate; and no letters of administration were taken out, either to him or to Southwell. Before the expiration of the last of the annuities in 1799, Beck, the executor, being desirous, as the answer expressed it, to give up the trust, paid over the balance of Southwell's assets, then in his hands, to his own son, the defendant Beck, who from that time acted in the execution of the testator's will, making payments to, and settling accounts with the persons beneficially entitled.

The bill was filed in 1820 by Tomlin, one of Southwell's grandchildren, against Beck, the son, and against the personal representative of Court, in order to compel them to account for the assets of Southwell possessed by either of the executors, or, since their decease, by either of the defendants.

1823.—Tomlin v. Beck.

It appeared from passages of the answer which were read, that in 1810, the clear balance, divisible among the legatees, was 39*l*. 5*s*. Of this sum, eight equal shares were paid to the persons respectively entitled, who thereupon executed a release [*439] of all their demands *in respect of their testator's estate. The ninth share, amounting to 4*l*. 7*s*. 2*d*., was left and still remained in the hands of the defendant's attorney, for the purpose of being paid over to Tomlin, whenever he chose to apply it.

Mr. Wakefield, for the plaintiff, contended that Beck, the son, by having possession of the assets of Southwell in specie, both during the life and after the death of Beck, the father, and by having affected to act in the execution of the trusts of the testator's will, and to do all which his personal representative ought to have done, and that too at a time when there was nobody filling the character of legal personal representative, had made himself executor *de son tort* to Southwell, and in that capacity was liable to render the account which the plaintiff sought; or if he was not executor *de son tort*, he had at least placed himself in the situation of a trustee, and as such ought to account.

It was not attempted to make out any case against Court's personal representative.

Mr. *Horne* and Mr. *Duckworth* for the defendant Beck.

THE MASTER OF THE ROLLS:—This plaintiff can have no right to the relief prayed, unless the defendant is clothed with that character of executor *de son tort*, in respect of which the account is sought. Now, I apprehend that there cannot be an executor *de son tort* constituted by intermeddling with the assets of a testator, when there is a rightful executor acting in the administration of those assets. An executor *de son tort* can [*440] be only where no person is clothed with *the character of rightful executor.(a) If a stranger possesses himself

(a) Anonymous, 1 Salk. 313. If H. get goods of an intestate into his hands, after

 1823.—Tomlin v. Beck.

of any part of the assets in the lifetime of the rightful executor, the only effect of his intermeddling is to create a privity between him and those who have the legal interest in the estate, and to make him responsible to them. Were the mere possession of assets to constitute a man executor *de son tort*, there might be, at one and the same time, both a rightful executor and an executor *de son tort*—the former deriving his title from the will which he had proved—the latter clothed with his character by virtue of his having part of the assets in his hands; and if portions of the effects of the deceased could be traced into the possession of twenty or more persons, each of them would, upon that principle, be an executor *de son tort*.

Though Beck, the father, some time before his death, handed over the residue of the assets to his son, he could not make an assignment of the executorship, or divest himself of his own responsibility; and if there had been twenty individuals employed by him, who had received and acted in the administration of the assets, they would have been accountable to him, and he to the estate. The defendant's possession of the assets having taken place in the lifetime of his father, he must, if he ever was executor *de son tort* to Southwell, have been so during the life of the rightful executor. It is clear, therefore, that he never was in any manner clothed with the character of executor. He was merely an agent, *who, at the executors' request, [*441] took upon himself the active duty of administering the balance of this small estate. That does not make him accountable for all the unadministered assets of Southwell.

With respect to his responsibility as agent (not to mention that the person to whom he would be so responsible—the rightful representative of Southwell—is not before the court), it ap-

administration is actually granted, it does not make him executor of his own wrong; but if he gets the goods into his hands before, though administration be granted afterwards, yet he remains chargeable as a wrongful executor, unless he delivers over the goods to the executor before the action brought, and then he may plead *plene administravit*

1823.—Burchett v. Woolward.

THE MASTER OF THE ROLLS:—The question is, whether the 20*l.* a year was intended to be wages, to continue so long as Mary Burchett should act as servant to the testator's wife, as a remuneration for her attendance; or whether it was to be an annuity during the life of Mary Burchett, coupled with a condition that it should be forfeited, if she did not, during his wife's life, continue to be her servant.

From the first part of the will it is clear that Mr. Cumming did not consider Mary Burchett as a person who stood simply in the situation of a servant: he evidently had a regard for her family; for he makes her children his residuary legatees, and provides for their maintenance. When he comes to the bequest to Mary Burchett, he gives her the "yearly sum of 20*l.* [*444] as long *as she should continue in the service of his wife." Here the yearly payment is characterized expressly as wages, and the payment is to continue only while the service continues. Then there follows the direction that, if Mary Burchett should so continue in such service, the 20*l.* should continue to be paid to her quarterly as an annuity. These words seem to import that he meant to give her an annuity subject to a condition, and that, if she survived his widow, she was to have the annuity for her life; and the clause, "that the said wages and annuities are to cease, in case Mary Burchett should leave the service of the testator's wife until the decease of the wife," implies temporary cessation, and that, after the widow's death, the annuity was to be paid to Mary Burchett.

On the whole, therefore, the sound construction is, that the testator gave to Mary Burchett an annuity, subject to a condition of continuing in the service of his wife during the wife's life. The death of the wife in the testator's lifetime made the performance impossible; and, therefore, the annuity is not forfeited, but belongs to Mary Burchett during her life.

"Declare that Mary Burchett is entitled to an annuity of 20*l.* during her life."

Reg. Lib. 1823, A. 262.

1823.—Goldsmid v. Goldsmid.

*GOLDSMID v. GOLDSMID.

[*445]

ROLLS.—1823: 12th December.

A testator bequeathed certain funds in trust for his wife, during her widowhood, and, after giving her a power to appoint them by deed or will, provided she did not marry again, directed, that upon her second marriage, or her death without having exercised her power, they should sink into the general residue of his estate; the widow executed a deed, purporting to be an appointment of the property to the residuary legatees in the same proportions in which they would have been entitled to it under the residuary clause, and she and they concurred in assigning the funds upon trust for the residuary legatees: the court refused to act upon the appointment and assignment during the widow's life.

BENJAMIN GOLDSMID, by his will dated the 25th of April, 1798, among other things, bequeathed to his executors the sum of 2,000*l.*, to be invested by them, in their joint names, in 3 per cent. consolidated bank annuities. This stock, with the dividends thereon, was to be held by them upon trust for his wife, Jesse Goldsmid, during her life, if she should so long continue his widow, but not otherwise or longer. If she should marry again, then, from such her marriage, the stock, with the dividends subsequently accruing thereon, was to sink into the residue of his personal estate in his said will given and bequeathed. If, on the other hand, she should not marry again, the capital moneys, and the *dividends which should become due [*446] thereon, were to be transferred and paid, after her decease, to such person or persons, and at such times and in such proportions, as she, by any deed or deeds, or by her last will (which instruments were to be executed with certain formalities), should appoint; and in default of appointment by Jesse Goldsmid, the stock and dividends were, upon her decease, to sink into and compose part of the residue of the testator's personal estate thereafter given and bequeathed.

The testator gave also to his executors a further sum of 25,000*l.*, to be in like manner laid out by them, in their joint names, in 3 per cent. consolidated bank annuities, which, with

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1823.—Goldsmid v. Goldsmid.

the dividends thereon, were to be held in trust for Jesse Goldsmid during her life, if she so long continued a widow, but, if she married again, were thenceforth to sink into the residue of the testator's personal estate, and be in trust for the several persons who might be entitled to such residue under that his will. If Jesse Goldsmid did not marry again, then two equal fifth parts of the stock purchased with the 25,000*l.*, and the dividends thereon, were directed "to be paid, transferred, shared and divided, after the decease of Jesse Goldsmid, unto and between all and every such children, if more than one, as the testator should have by the said Jesse Goldsmid, or with which she might be *eniente* at the time of his decease, or the whole of such two-fifth parts of such capital stock and dividends to one of such children only," at such times, and in such manner and proportions, as she, the said Jesse Goldsmid, by any deed, &c., or by her last will, &c., should appoint; and, in default of appointment, these two equal fifth parts of the above-mentioned stock and dividends were upon the death of the widow, to sink into the testator's residuary personal estate, and to be **in* trust, as a portion thereof, for the persons who should be entitled to it under the will.

With respect to his residuary estate, the testator, after directing the interest and dividends to be accumulated until his sons attained their respective ages of twenty-one or married (subject to an allowance for their maintenance, so long as they were severally under age), declared his meaning to be, that, when his sons should respectively attain their ages of twenty-one years or marry with consent, there should thereupon be assigned and transferred unto each and every son, on attaining his age of twenty-one years, or so marrying, one full moiety of his share of the said residuary estate, and of the accumulations which should have been made thereupon; and that the interest of the other moiety should be paid to him, until he attained the age of twenty-five years; at which time the whole moiety was to be transferred to him absolutely. Provision was next made for the case of any son dying under twenty-one, and unmarried and

1823.—*Goldsmid v. Goldsmid*.

then came a clause declaring, "that, in case all the sons should live to attain his and their several and respective ages of twenty-one years, or be previously married with such consent as aforesaid, and any or either of them should happen afterwards to depart this life under the age of twenty-five years, and without leaving lawful issue who should live, if male, to attain the age of twenty-one years, or if female, to attain that age or marry," in such case the testator bequeathed "the other remaining moiety both original and accrued, of such son and sons so dying, of and in the residue of his estate, unto and between the survivors and survivor of all his said other sons, share and share alike; and if there should be only one such surviving son, the whole to such only surviving son *absolutely; the part and [*448]. share both of principal and interest to be paid to such surviving son or sons at the time and times his and their original share and shares of their several remaining moieties, and the interest thereof, was or were appointed to be paid as aforesaid, and to be in all respects subject and liable to the like trusts thereof."

The testator died in April, 1818, leaving, besides his widow and daughters, five sons him surviving, whose names were John, Louis, Henry, Lionel, Albert and James. The last of these attained the age of twenty-five years on the 25th of December, 1812, and died on the 18th of October, 1814, unmarried and intestate. The four other sons were still alive, and had all attained the age of twenty-five years. John Louis Goldsmid and Henry Goldsmid had taken out letters of administration to James.

The sums of 2,000*l.* and 25,000*l.* were duly invested according to the directions of the will; and the stock purchased therewith now stood in the names of the three trustees—the widow Jesse Goldsmid, who was still unmarried, Isaac Lyon Goldsmid and Timothy Yeats Brown.

By an indenture, dated the 2d day of April, 1823, which was made between the widow of the one part, and the four surviving sons (all of whom had attained the age of twenty-five years) of

1823.—Goldsmid v. Goldsmid.

the other, and which was executed with the formalities required by the will of Benjamin Goldsmid, Jesse Goldsmid, in pursuance of her power, appointed (without prejudice to her own life interest) that, after her death, without being married, the stock, in which the 2,000*l.* was invested, should be paid and [*449] *transferred to John Louis Goldsmid, who was to stand possessed of the same, as to one fourth part, for his own use; and, as to the remaining three fourth parts, for his three brothers, share and share alike; and likewise, that nine tenth parts of two fifth parts of the stock in which the sum of 25,000*l.* was invested, should, immediately after her death, belong and be paid to her four sons equally, as tenants in common.

By another indenture, dated the 3d of April, 1823, the widow Jesse Goldsmid, so far as related to the dividends of the stocks so appointed as aforesaid, which should become due during her widowhood, and her four sons, John Louis Goldsmid, Henry Goldsmid, Albert Goldsmid and Lionel Goldsmid, so far as related to their right and interest in the said stocks, assigned and transferred the dividends and principal thereof to James William Ogle and Richard Lovell Brown, their executors and administrators, as trustees to hold the same "upon trust to pay and apply the said stocks and the produce thereof in such manner as each of them, the said John Louis Goldsmid, Henry Goldsmid, Albert Goldsmid and Lionel Goldsmid, and his respective executors, administrators and assigns, as to his or their respective part or share, should direct or appoint."

The object of the execution of these two indentures was to give the sons immediate dominion over so much of the fund as, it was supposed, they either *might* become ultimately entitled to under the mother's power of appointment, or, in the event of the failure or non-exercise of that power, *would* become entitled to by virtue of their father's residuary disposition. Two of the trustees, however, in whose names the stock stood upon the trusts of Benjamin Goldsmid's will, refused to make any [*450] *transfer, except under the direction of the court, to

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the persons who, by the indenture of the 3d of April, were appointed trustees for the four sons. Accordingly, the present bill was filed by the last-mentioned trustees, the widow, and two of the sons, against the personal representatives of the testator, the trustees of the stock under the will, and the two sons who had taken out administration to their deceased brother James. The prayer of it was, that the indentures of the 2d and 3d of April might be established by and carried into effect under the direction of the court, and that J. L. Goldsmid and T. Y. Brown might be decreed to join with Jesse Goldsmid in transferring the stock in which the 2,000*l.* had been invested, and nine tenth parts of two-fifths of the stock in which the 25,000*l.* had been invested, to J. W. Ogle and R. L. Brown, upon the trusts of the indenture of the 3d day of April, 1823.

The trustees, by their answer, submitted to act as the court should direct.

Mr. *Bickersteth* for the plaintiffs:—In any event that can happen, those who now apply to have these sums transferred must ultimately be entitled to them. Jesse Goldsmid has a power of appointing the sums, subject only to the contingency of her dying the testator's widow; and, should her power fail by reason of a second marriage, they fall into the residue, and, passing under the residuary clause, belong to the testator's four surviving sons, who, having all attained the age of twenty-five years, will take vested and absolute interests in their respective shares. In the event, indeed, of no good appointment being made, the representatives of James, the deceased son, will be entitled to a moiety of one fifth part of the principal and *accu- [*451] mulations of the stock which was purchased with the 25,000*l.*; for the residuary clause gives to each of the five sons, upon attaining twenty-one, a vested interest in a moiety of their respective shares of the residue. But this possible interest of James has been carefully excepted from the operation of the two indentures; they affect only nine tenth parts of two fifth parts of the 25,000*l.*, and leave untouched the remaining tenth part,

1823.—*Goldsmid v. Goldsmid*.

which is the utmost that the representatives of James can ever be entitled to.^(a) The only property, therefore, upon which the bill seeks to act, is property which, either under the power or under the residuary clause, must, upon the death of the widow, belong to her four sons, and in which no person but she or they has or can have any interest. If Jesse Goldsmid dies without marrying a second husband, the indenture of the 2d, of April will be a good appointment, and, consequently, the indenture of the 3d of April will be a valid assignment to the sons' trustees. If, on the other hand, she marries again, the fund becomes part of the residuary estate; and being, under the testator's residuary bequest, the absolute property of the sons, will pass by their conveyance to their trustees. Where one individual has the power of disposing of a sum of money, subject, on a particular contingency, to a restriction *in favor of certain other persons, can any reason be imagined why those in whose favor the restriction is created, and he who has the power subject to the restriction, should not by their concurrence be enabled to acquire the absolute dominion over the fund?

Mr. *Sugden* and Mr. *Barber* for one of the trustees:—As Jesse Goldsmid's power is contingent upon her dying a widow, it cannot be known during her life whether an appointment made by her is good; the indenture of the 2d of April is, therefore, as yet a mere dead letter; no interest can at present exist under it; no court can act upon it. Neither can the residuary clause of the will help the plaintiffs, for the operation of it upon the funds in question is likewise contingent; till the widow dies, it is impossible to say whether these sums will or will not form part of the residue.

(a) It would seem that, independently of the objections to the principle of the arrangement, which this bill sought to carry into effect, the indentures of the 2d and 3d of April did include funds to which the representatives of James might have become entitled. These two instruments, though they appointed and assigned only two-fifths of the 25,000*l.*, purported to pass the interest in the whole of the 2,000*l.*; and as this latter sum was to fall into the residue, if the widow married again, the representatives of James would, in that event, have a right, by virtue of the residuary clause, to claim a moiety of the fifth of the 2,000*l.* as well as of the 25,000*l.*

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It is said that all the parties interested in the subject of the suit are before the court. How does that appear? The residuary clause is very intricate; is the court now in a situation to decide upon its effect, and to determine whether all who may be ultimately entitled under it, are here to protect their rights? The daughters of the testator, as being some of the next of kin of James, have an interest in the share of the property; yet there is no person here to watch over this interest of theirs, except the personal representatives of James, whose claims in their own right are directly adverse to his estate.

Mr. *Tinney* for the other opposing trustee.

*THE MASTER OF THE ROLLS:—This bill calls upon [458] the court to exercise a very novel species of power by way of anticipation—to act immediately on two titles, both of which at present depend on a contingency, as forming together one perfect title; and to do so, because, though neither of them by itself is as yet worth anything, yet either the one or the other, it is said, must ultimately be valid. Take the titles separately—there is nothing which can give the court authority to act. Are we to proceed upon the power of appointment? While Jesse Goldsmid lives, it cannot be known whether she has any such power to exercise; her power being suspended till her death, no alleged exercise of it can be recognized by the court during her life.

It is said, however, that in the event of the failure of the power, the fund in question will fall into the testator's residuary estate, and will, by virtue of his residuary disposition, become the absolute property of those who seek immediate dominion over it. But *has* it become their property *now*? Or are we at present in a situation to divide the residue, or to settle the construction of the residuary bequest? Surely, it is premature to consider what is to be done with the property, should no good appointment be made, or to deal with these sums as included in a residue, of which it is uncertain whether they will ever form a part.

1823.—Goldsmid v. Goldsmid.

Not only is this not the time for proceeding upon the testator's residuary disposition ; it does not appear that all the persons, who may be interested in the residue, are parties to the suit. How does the court know that these four brothers are the only persons interested in the residue, or in this pre-
[*454] sumed part of the residue? *James, it is admitted, may turn out to have acquired an interest under the residuary bequest ; and, accordingly, recourse has been had to the contrivance of excepting from the indentures of the 2d and the 3d of April, a tenth part of the two-fifths of the 25,000*l.*, which is calculated to be that portion of the fund to which his representatives may in certain events be entitled. The calculation may be right : but how can I now decide whether the portion of James has been truly estimated, represented as his estate is, by two of his brothers, who in their own right, have an interest adverse to that which it is their duty to claim in the character of his administrators. Under these circumstances we cannot touch the interest of James, in the absence of the daughters, who are among his next of kin.

Thus the plaintiffs claim under two titles, neither of which is at present complete : the power is at this moment worth nothing, for the widow may marry again : the title under the residuary clause is equally worthless, for there may be a good exercise of the power. Can then two incomplete titles make one complete title ? Can two contingent, defeasible rights make one sure and indefeasible right ? Separately, neither title is good ; for there is an objection to each : how then can they become good by conjunction ?

It is of no avail to say, that ultimately a time will come, when in one character or another, the persons who now apply, will be entitled to the fund. They must wait till that day arrives. It is not the habit of the court to intermeddle with property given by a testator's will upon specified trusts, till the time comes when the property may be disposed of in the very mode and form which the testator has prescribed. It was the intention of

 1823.—Reid v. Middleton.

the testator that the funds in question should be subject *to a power of appointment in his wife, which, as it de- [*455] pended on the contingency of her dying a widow, was to remain in suspense so long as she lived. Till her death the destination of the property was not to be fixed: there was a restriction, on the absolute disposal of it. If we dispense with this restriction, we do not execute the intention of the testator, but lend the aid of the court to enable parties to set that intention aside.

The bill was dismissed.

 REID AND OTHERS v. MIDDLETON.

1823: 4th and 15th December

Where a receiver is appointed, and the person in possession refuses to attorn, or to deliver up possession, it not appearing in what right the possession is held, the proper course is to move that the person may attorn.

It is not necessary, in the first instance, to make such person a party to the suit.

THE plaintiffs were equitable mortgagees, by deposit of the lease of the Gordon Arms public house, for money lent and advanced by them to the defendant Middleton, who was the tenant of the house at a small ground rent. The defendant Middleton, after he had deposited the lease with the plaintiffs, had agreed to assign his interest in it to the defendant Griffiths, subject to the plaintiff's demand. The defendant Griffiths had been let into possession of the house under the agreement, but no assignment of the lease had been executed to her.

The bill was filed on the 3d of December, 1821, for the purpose of enforcing the equitable mortgage: and it prayed, amongst other things, the appointment of a receiver of the premises. On the 14th of June, 1822, *the defendant Mid- [*456] dleton being out of the jurisdiction, and the defendant Griffiths in contempt for want of answer, the plaintiff obtained an order for the appointment of a receiver, with the usual direc-

1823.—Reid v. Middleton.

tion that the tenants should attorn and pay their rents in arrear and growing rents to such receiver. On the 16th of July, 1822, a receiver was appointed accordingly.

A motion was now made before the Lord Chancellor, on the part of the plaintiffs, that William Jackson, the person in possession of the Gordon Arms public house, might be ordered, within fourteen days, to deliver up possession to the receiver; or, that it might be referred to the Master to set an occupation rent upon the premises for the time which had elapsed during the possession or occupation thereof by the said William Jackson, and for the time to come; and that the said William Jackson might be ordered to pay the arrears and future payments of such rent, after deducting what he had paid or might pay for ground rent, to the said receiver.

The motion was supported by the affidavit of the receiver, by which it appeared, that at the time of the filing of the bill, the defendant Griffiths was in the occupation of the premises as claiming title thereto under the defendant Middleton; that in April, 1822, the defendant Griffiths quitted the premises and delivered possession thereof to Jackson, who had ever since been in possession; that repeated applications had been made to Jackson to deliver up possession, or to attorn tenant to the receiver and pay rent to him, but that Jackson had refused either to deliver possession or to pay rent, though he had, from time to time, promised to come to some arrangement; that Jackson had paid rent to the ground landlord, and that whatever interest [*457] *had been acquired by him in the premises had been so acquired since the filing of the bill, and with full knowledge of the claim of the plaintiffs, of which he had been informed by the receiver before he entered into possession.

The motion had been made before the Vice-Chancellor, who had declined to make the order, upon the ground, as was stated at the bar, that, to enable the court to enforce the receiver's possession, Jackson must be made a party to the suit; that he being

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in possession, and it not appearing that he was tenant, the court could not act upon his possession unless he was made a party. Jackson, though served with notice, had not appeared upon the motion before the Vice-Chancellor.

Mr. *Hart* and Mr. *Wigram*, in support of the motion, said, that if the rule of the court was as laid down by the Vice-Chancellor, the plaintiffs must abandon the suit. That Jackson, the moment he was made a party for the purpose of enforcing the receiver's possession, and before any order could be obtained, would deliver up possession to some other person, and an endless succession of supplemental bills would be necessary.

Mr. *Horne* and Mr. *Wilbraham*, appeared for Jackson, and submitted that the objection made by the Vice-Chancellor was fatal to the application. But the Lord Chancellor said, that where a receiver was appointed, the ordinary direction was that the tenants should attorn; that the court could not know who were tenants; but that if application was made to A. B. and C. to attorn, and they would not do so, the course was to move that they should attorn, and then they were to come and inform the court whether they were tenants or not.

*Mr. *Horne* and Mr. *Wilbraham*, then stated that Jackson had taken possession with the consent of the plaintiffs, and upon the understanding that he was to pay the ground rent only. [*458]

The LORD CHANCELLOR said, that unless the contrary was shown by affidavit, it must be understood that the plaintiffs only consented to Jackson's taking possession upon the same terms as any other person, and directed the motion to stand over till the next seal, with liberty to Jackson to file an affidavit. If no affidavit was filed, the order was to be taken according to the notice of motion.

December 15th.—Jackson consenting to pay an occupation rent to be settled by the Master, the order was made accordingly.

1823.—Reid v. Middleton.

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ROLLS.—1823: 15th December.

An officer in the army cannot pledge or mortgage his commission.

An officer deposited his commission as a security for a loan of money, and further covenanted with the depositary B. to sell the commission, and to repay the loan out of the proceeds of the sale; a sale having been effected subsequently, and the regulation price having been paid to the retiring officer's agents, he transmitted to them a written order, directing them to discharge, out of the money in their hands, certain specified debts due from him to certain specified individuals, which individuals had no notice of his contract with B.: Held, that these creditors were entitled to a priority over B.

After the institution of the suit, the officer took the benefit of the Insolvent Debtors Act: Held, that B. had not any title, preferable to that of the general body of the insolvent's creditors, to the surplus which remained after the debts specified in the written order were satisfied.

On the 19th of March, 1807, Charles Fallon, being then a lieutenant in the eleventh regiment of dragoons, and having had various sums of money advanced to him by Richard Campbell Bazett, as agent of Alexander Colvin, who was resident in Calcutta, signed and delivered to Mr. Bazett a note, which was in the following words:—

“LONDON, *March 19th*, 1807.

“I do hereby acknowledge to have received from Mr. Richard Campbell Bazett, the sum of 150*l.* on the 31st January, 1807, and on this date the sum of 350*l.*, making in all 500*l.*, which I engage to repay him on demand, with interest from the respective dates; and it is hereby understood that my commission as a lieutenant in the eleventh regiment of dragoons is deposited with Mr. Bazett as a security for these sums.

“CHARLES FALLON.”

In September, 1809, Fallon being desirous of purchasing a captaincy in his regiment, applied to Bazett, as the agent of Colvin, to advance to him 1,900*l.* for that purpose; and Bazett, in compliance with the instructions of his principal, agreed to ad-

1823.—*Collyer v. Fallon*.

vance the money, provided Fallon would secure the repayment *of the 1,900*l.*, and of a further sum of 600*l.* [*460] previously due from him to Colvin, both by his bond and by the deposit of the commission which he then held or might thereafter hold in the regiment. Upon these terms the money was advanced; and Fallon, on the 16th of September, executed a bond for 5,000*l.* to Colvin, or his attorney, or his executors, administrators or assigns. The condition of the bond was, that Fallon should insure his life and place the policy of assurance in Bazett's hands; that he should deposit with the same gentleman the lieutenant's commission which he then held, and the captain's commission which he had agreed to purchase, accompanied with a letter addressed to the commander in chief, requesting his permission, or that of his Majesty, to sell the commissions at the expiration of twelve calendar months from the date of the bond; and that he should accordingly sell the commissions, and out of their produce repay to Colvin, his executors, administrators or assigns, or to Bazett as his attorney, the sum of 2,500*l.*, with interest, and the expenses of insurance, if in the meantime the regiment were not sent to India, or he did not procure an exchange into some troop or regiment stationed in India; but, if either of these events happened,(a) that he should repay Colvin, his executors, administrators or assigns, the 2,500*l.*, with interest, and the expenses of insurance, by five yearly instalments.

Fallon afterwards purchased a captain's commission, and deposited it with Bazett, in whose hands it still remained.

*On the 11th of September, 1812, an indenture was [*461] executed between Fallon, of the first part, Bazett, of the second part, and certain creditors of Fallon, who had agreed to accept a composition of 10*s.* in the pound on their respective

(a) It did not appear in the pleadings, whether either of these events had happened. But, in fact, neither was the regiment sent to India, nor did Captain Fallon exchange into a troop stationed in India.

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debts, of the third part. This deed declared that the commission, which was then deposited with Bazett, should remain in his hands as a security for the amount of the composition, and that, if the composition was not paid within twelve months, Bazett should have authority to sell the commission, and to apply the proceeds of it in discharge, first, of his own demand, and, next, of the sums due upon the composition to the creditors whose names were contained in an annexed schedule. Fallon also covenanted that he would concur in the sale, and do whatever might be necessary for effectuating it; and that he would not in the meantime incumber the commission, or do any act by which it might be incumbered, to the prejudice of those creditors or of Bazett; and he constituted Bazett his attorney for the purpose of making and completing the sale and of receiving the purchase money.

From 1812 to 1815 matters remained in this state; and, during the interval, nothing was done under the last-mentioned indenture, although the composition had not been paid. In January, 1815, Captain Fallon, having obtained leave from the commander-in-chief to retire from the service, and to sell his commission, employed Messrs. Collyer, as army agents, to assist him in effecting the sale. Under this authority they sold the commission to Lieutenant Binney for 1,785*l.*, and received the purchase money.^(a)

[*462] *On the 12th of January, 1815, Fallon delivered to Messrs. Collyer the following memorandum, bearing date on that day, and signed by him:

“Sums to be retained by Messrs. Collyer out of the purchase money of my troop in the eleventh dragoons, as lodged by Lieutenant Binney of that regiment, viz., 1,785*l.*

(a) The exact date of the completion of the purchase did not appear in the pleadings. Fallon, in his answer, stated that he was a captain in the eleventh regiment of dragoons till on or about the 26th of January, 1815.

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	£	s.	d.
Regimental debts, Lieutenant Binney's acceptance	500	0	0
Messrs. Armitt & Borough	116	1	1
Captain Duberley for his draft	50	0	0
Messrs. Fairlie, Bonham & Co., and for which I have given a separate authority	500	0	0

"I hereby authorize Messrs. Collyer to retain the above sum out of the purchase money of my troop lodged in their hands."

On the same day he delivered to Fairlie, Bonham & Co. his promissory note of that date for 500*l.*, accompanied by the following note, signed by him, and addressed to Messrs. Collyer:—

LONDON, *January* 11, 1815.

"Gentlemen,—I hereby authorize you to retain the sum of 500*l.* out of the money lodged by Lieutenant Binney, of the eleventh dragoons, for the purchase of my troop, to pay my order for that amount in favor of Messrs. Fairlie, Bonham & Co."

Messrs. Collyer, upon receiving this note, promised to retain, out of the money in their hands, 500*l.* for the use of Fairlie, Bonham & Co.; and the Master found, that it was their intention to have paid it, had they not *been prevented [*463] by Bazett's claim, and the proceedings to which it gave rise.

On the 30th of January, 1815, Bazett informed Messrs. Collyer of the assignment of the produce of the commission by the deed of September, 1812. On the 1st of February following, he sent to their solicitor a copy of that indenture, at the same time giving them notice of the bond which had been executed, and of the fact that the commissions were deposited with him under a declaration, in Fallon's handwriting, that they were intended as a security for the debt due from that gentleman to Mr. Colvin. Of the 2,500*l.*, Fallon had paid off 925*l.*; the remaining 1,515*l.*

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was still unsatisfied, with an arrear of interest exceeding 964*l.*; and the sum due under the composition deed to the creditors who were parties to it, amounted to 800*l.* Bazett, therefore, as attorney of Mr. Colvin, and trustee for these creditors, insisted that he was entitled, in preference to every other claimant, to the fund produced by the sale of the commission, and called upon Messrs. Collyer to pay to him the whole of the money. On the other hand, Fallon commenced an action against the army agents for the recovery of the balance which would remain in their hands after the payment of the sums appropriated by the memorandum of the 12th of January, 1815.

Under these circumstances, Messrs. Collyer filed a bill of interpleader, stating the various claims which had been made to the fund, and praying that the rights of the different claimants might be ascertained.

Fallon, by his answer, declared that the commission had been sold entirely for his own purposes, and with the view of applying the purchase money according to his own discretion: [*464] and he insisted, that both the bond *and the indenture, so far as they affected to operate upon the produce of a commission, for the sale of which leave had not then been obtained, were contrary to the policy of the law.

On the 5th of October, 1815, Fallon took the benefit of the Insolvent Debtors' Act; and a supplemental bill was filed against John S. Sharkey, his assignee.

By an order, dated the 23d of July, 1821, it was referred to the Master, to inquire into, and state the priorities of the different claims which had been made upon the money paid into court by the plaintiffs.

The report, dated the 12th of May, 1823, set forth the claims of the different parties, and the circumstances upon which they were founded. After mentioning the demand of Sharkey as

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assignee under the Insolvent Act, the Master added, that no assignment of Fallon's estate and effects had been produced, but that, in an order of the Insolvent Debtors' Court, dated the 4th of August, 1818, Sharkey was described to be assignee of Fallon's estate, and ordered to account for the effects gotten in by him in that character.

At the hearing, on further directions, the claims of three adverse interests were to be determined.

First, Bazett claimed a lien on the fund in court, which entitled him, and those whom he represented, to payment of the whole of their demands, in preference to every other creditor.

Secondly, the creditors, enumerated in the memorandum of the 12th of January, 1815, insisted that they had a right to be preferred both to Bazett, and to the general creditors.

*Thirdly, the assignee under the Insolvent Debtors' [*465] Act denied the right of either Bazett or the creditors specified in the memorandum, to any priority; and, on behalf of the general creditors, claimed the whole of the fund, or, if one of the two alleged priorities should be sustained, the residue of it, for the purpose of proportional distribution.

Mr. *Shadwell* and Mr. *West*, for Bazett, argued first, that by analogy to the principle on which the deposit of the title deeds of real estate was held to constitute an equitable mortgage of the land, the deposit of a commission in the army as a security for money, particularly when that money had been advanced by the depositary to the borrower, to enable the latter to purchase the commission, and had been employed for that purpose, would create a specific lien on the money which might afterwards be raised by the sale of the military rank which the borrower had acquired and held by virtue of the commission so deposited.

Secondly, there was between Bazett and Fallon an express

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contract with respect to the future produce of the sale of the commission, which, in equity, constituted the latter a trustee for Bazett and those whom he represented, and gave them a specific lien on the money for which the commission should at any time be sold. "Whatsoever is the agreement," says Lord Loughborough in *Legard v. Hodges*,^(a) "concerning any subject, real or personal, though in form and construction purely personal and suable only at law; yet, in this court, it binds the conscience,"

and, as he afterwards adds, "raises a trust." By the [*466] bond of the 16th of September, 1809, as well as by the indenture of the 11th of September, 1812, Fallon contracted, that, upon certain contingencies which have happened, the commission should be sold, and the money obtained for it applied in discharge of Bazett's demand: therefore, in endeavoring to appropriate any part of that money to a different purpose, he seeks to commit a fraud upon his own contract. This engagement was consistent with the rules of law: 5 and 6 Edward VI., c. 16; 49 Geo. III., c. 127, s. 7; *Berrisford v. Done*.^(b) Even if objections could be taken to it, so far as it bound Fallon to sell his commission, it would remain valid to the extent of charging the money produced by the sale of the captaincy. *Greenwood v. Bishop of London*.^(c)

Mr. *Horne* and Mr. *Norton*, for Fairlie, Bonham & Co., and the other creditors in the same situation with them:—It is settled that neither the full pay nor the half-pay of an officer can be assigned or pledged; *Berwick v. Read*,^(d) *Flarty v. Odum*.^(e) The principle has been extended to other transactions, comprehended within the same views of public policy, which were the foundation of the rule; *Davis v. The Duke of Marlborough*,^(g) and it will undoubtedly include such dealings as those which have taken place between Fallon and Bazett. If the pay of an officer cannot be pledged or assigned, *a fortiori* the commission itself and the right and title to that military rank, in respect of

(a) 1 Ves. jun. 478.

(b) 1 Vern. 98.

(c) 5 Taunt. 727; 1 Marsh. 292.

(d) 1 H. Blacks. 627.

(e) 3 T. R. 651.

(g) 1 Swanst. 79.

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which the pay becomes due, must be incapable of being so dealt with. The money, which, upon the retirement of an officer from the army, is *frequently paid by the individual who succeeds to his rank, is not the price of any property transferred from the former to the latter: it is only with the permission and by the authority of the crown that it is paid by the one or received by the other. The sum which Lieutenant Binney deposited in the hands of the army agents, was not the consideration money for any property, interest, or thing which Fallon either had or could have pledged or assigned; it was merely in consequence of the royal favor, that Fallon became entitled to that sum: and, consequently, Bazett had no lien upon it. On the other hand, the creditors enumerated in the memorandum of the 12th of January, 1815, had a lien upon it: for that memorandum was, to the amount of the sums stated in it, a good equitable assignment of an existing fund held by Messrs. Collyer for the benefit and at the disposal of Fallon. *Ex parte Alderson.*(a)

THE MASTER OF THE ROLLS:—The question is not, whether it is legal for an officer to sell his commission, but what is the effect of his making a deposit of the parchment or instrument which appoints him to hold, and is the evidence of his being invested with, a certain military rank? Can such a deposit be lawfully made by an officer who continues in the service? If it can be so made, what are the rights which it gives to the depositary? A military commission is in its very nature personal; being the authority under which the individual named in it is to act, it cannot be separated from him, and is of no use to any one else. If he should be taken prisoner—if any doubt should arise with respect to seniority or comparative rank—should there, on any occasion, be a question as to his title to enjoy all the rights and privileges attached to *the service—the [468] commission is the document on which the officer must rely, and which he must therefore take care to keep always

(a) 1 *Mad. Rep.* 53.

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within his own power. If he were at any time called upon to produce the authority under which he claimed to act, would it be any answer to say, that he had placed it in pledge or mortgage? The commission is not property: he could not sell it; more than the parchment, at least, he could not sell; and for the purpose of effecting a sale of the office, the possession of the parchment is not necessary. Apart from the officer named in it, the commission is nothing; in the hands of a stranger it is mere waste paper, conferring neither authorities nor rights. The depositary could not go to the war office, and claim either whole or half-pay; for military pay is not assignable: neither could he give any body else a right to receive pay. The most alarming consequences might follow, if it were to be held that an officer might pledge or mortgage his commission; and it is of importance that it should be generally understood, that this court will not entertain the doctrine, that an officer, while he remains in the service, can lawfully part with his commission by way of pledge or mortgage, or that he can by so doing, give the depositary any rights with respect to it.

Fallon, in depositing his commission with Bazett, did that which he could not do legally, and which, therefore, cannot create a lien in favor of Bazett. For the purpose of establishing his present claim, the deposit is nothing. The parchment instrument was all that was put into his hands; he still has it, and he may make of it what use he can.

Bazett, therefore, if he can maintain his claim at all, must stand exclusively upon contract; and a contract he undoubtedly had, but not such contract as *creates lien. [*469]

The argument on his side has been, that whenever parties contract with respect to a subject matter, that subject matter is thereby bound. I assent to the principle when rightly understood; but it is a principle which must be received with qualifications. Contract with respect to a given matter binds the property as between the parties to the contract; but it does not affect the rights of third persons, or bind the property in reference to

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any claim which they may have upon it, unless they either have notice, or are volunteers. This limitation of the proposition is stated explicitly by Lord Loughborough in the very passage which was relied on.^(a) "Whatsoever," says he, "is the agreement concerning any subject, real or personal, though in form and construction merely personal and suable only at law, yet, in this court, it binds the conscience;" that is to say, the conscience of the parties to the agreement, and of those who claim under them, either with notice or without consideration. For his Lordship adds, "This maxim I take to be universal, that wherever persons agree concerning any particular subject, that in a court of equity, as *against the party himself, and any claiming under him voluntarily or with notice*, raises a trust." Now Fairlie & Co., and the other persons who along with them claim a lien on the fund in court, in opposition to Bazett's demand, though they claim under Fallon, do not claim voluntarily or with notice. They are *bona fide* creditors; and there is no evidence that they had notice of Fallon's agreement with Bazett. By the bond and the indenture, Fallon engaged that when his commission should be sold, part of the produce of it should be appropriated to pay Bazett, and that contract was undoubtedly good and binding as between Fallon and Bazett. The commission was subsequently sold through the agency of Messrs. Collyer, who received *the money on behalf of the vendor; and he di- [*470] rected them to apply a certain part of it in discharge of the claims of some creditors, whose names, with the amount of their respective debts, are set forth in a written particular. The agents consider themselves bound, as against the property, to distribute it according to this particular; though having, before it was so applied, received notice of Bazett's claim, they have thought it prudent to transfer the fund into court, and to abstain from acting upon their own responsibility. The vendor's order to the agents to pay the creditors was an appropriation of the money; and these creditors, through the agents, obtained possession of the fund. Whether the vendor, in making that appro-

(a) 1 Ves. jun. 478.

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priation, committed a fraud upon his contract with Bazett, is a question with which they have no concern; for they were no parties to that contract, and had no notice of it. The case would be very different if it were shown, either that they had notice of Bazett & Co.'s rights under the agreement with Fallon, or that they were not creditors for a valuable consideration.

In truth, this is the common case of a debtor, who, having a fund in the hands of his banker, gives some of his creditors a right to take it, and distribute it among themselves in satisfaction of their demands. The order on Messrs. Collyer to pay the creditors enumerated in the memorandum of the 12th of January, was an assignment by Fallon of a *chose in action*; it created lien, and those in whose favor it was given got hold of the fund. The adverse claimants have nothing to oppose to this lien except contract.

Therefore, on both of the questions raised in this suit, Bazett must fail.^(a)

[*471] *This point having been determined, Mr. *Roupell*, for the assignee, under the Insolvent Debtors' Act, was proceeding to argue, first, that no person was entitled to any preference over the general creditors; and, secondly, that even if the creditors whom the court had preferred to Bazett & Co. were to be preferred to the general creditors, Bazett & Co. had no title to priority, and ought to rank *pari passu* with the other creditors of the insolvent.

THE MASTER OF THE ROLLS:—The Master in his report finds that no assignment of the estate and effects of Fallon had been

(a) See the following cases:—*Crouch v. Martin*, 2 Vern. 595; *Law v. Law*, Cas. temp. Talbot, 140; *Stuart v. Tucker*, 2 W. Blackst. 1137; *Lidderdale v. The Duke of Montrose*, 4 T. Rep. 248; *Stone v. Lidderdale*, 2 Anst. 533; *Mouys v. Leake*, 8 T. Rep. 414; *Davis v. Edgar*, 4 Taunt. 63; see also 1 G. 2, st. 2, c. 14, and 1 G. 4, c. 119, s. 38.

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produced before him. The court cannot listen to counsel for an alleged assignee, of whose title to that character of assignee, in which alone he would have a right to be heard, it has not the requisite evidence.

The decree directed that the Master should tax the costs, and compute interest up to the date of his further report on the debts of Fairlie, Bonham & Co., Armit & Borough, and Duberley, and that they should be paid their principal, interest and costs out of the fund in court. It then ordered "the residue of the money and cash to be paid to the defendant, Richard C. Bazett, on account of his claim of 2,539*l.* 13*s.* 9*d.* for principal and interest mentioned in the Master's general *report;(a) [*472] and his Honor," the decree added, "doth not think fit to give any costs to the defendant, R. C. Bazett.(b)"

Sharkey, the assignee, under the insolvent debtors' act, presented a petition of rehearing, which prayed that the court would reverse so much of the decree of the 15th of December, 1823, as directed the residue of the money produced by the sale of Fallon's commission to be paid to the defendant, Richard C. Bazett,

(a) Sir Thomas Plumer did not decide any question as between the assignee under the Insolvent Debtors' Act on the one hand, and either Bazett, or the creditors whose priority was established, on the other hand; though the principles on which his judgment proceeded, would obviously sustain the claim of the latter against that of the general creditors. Neither was the direction in the decree for the payment of the residue to Bazett, the result of any opinion expressed by the court on any question that might be raised between him and the assignee. In the circumstances, under which the cause came on to be heard, Bazett was the only party before the court who was in a condition to assert any claim to the residue: for Sharkey had not proved himself to be assignee.

(b) The question argued and decided at this rehearing had not been brought before the court at the original hearing on further directions; for Sharkey, not being then in a condition to make out his title to the character of assignee, could not raise the point.

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and, instead thereof, would order that residue to be paid to the petitioner in his character of assignee.

It did not question the priority of the creditors who were included in the memorandum of the 12th of January, 1815.

Mr. *Roupell* and Mr. *Knight* for the petitioner.

Mr. *Horne*, Mr. *Shadwell* and Mr. *West* for Bazett.

The petitioner had obtained an order to prove *viva voce* at the hearing the assignment to him of Fallon's estate and effects; but Mr. *Horne* and Mr. *Shadwell* [*473] relieved him from all difficulty on that point by admitting that he was the assignee of the insolvent, and choosing to argue the question on its merits.

For the petition it was argued, that the general creditors ought not to be postponed to Bazett, who, with his *cestui que trust* Colvin, were at the utmost only specialty creditors of Fallon. There was nothing in the transactions between Fallon and Bazett, which could create lien upon, or amount in equity, to an assignment of the proceeds of the sale of the commission. Indeed, that part of the decree, in which all parties acquiesced, proved, that the alleged lien of Bazett was altogether a nullity. For if Bazett was, in truth, assignee of the fund, his title, such as it might be, was the first in point of time, and would, therefore, have prevailed against the equitable assignment to particular creditors contained in the memorandum of the 12th of January. In fact, however, the court had determined in favor of these particular creditors, and had even refused costs to Bazett. Consequently, Bazett could not be assignee of the fund; and, if he was not such assignee, he had no claim upon it, except as ranking *pari passu* with the other creditors.

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In reply to this line of argument, Mr. *Horne* and Mr. *Shadwell* observed, that the reason why *Bazett* had failed in the competition with the creditors enumerated in the memorandum was, that these creditors had been held to be assignees of particular portions of the fund for valuable consideration. The present claimant did not fill that character; and consequently, there was nothing in the principle which had prevented *Bazett* from having the first priority, to exclude him *from [*474] preference over the general mass of creditors. The contract of *Fallon* with *Bazett*, bound the proceeds of the sale of the commission as between the parties to that contract. The assignee under the Insolvent Act could not be in a better situation than the insolvent himself would have been; and, consequently, as against that assignee the claim of *Bazett* must be allowed.

December 10th.—LORD GIFFORD, MASTER OF THE ROLLS:—
On the best consideration which I have been able to give the subject since the case was last heard, it appears to me, with the utmost deference for the decision of the late Master of the Rolls, that Mr. *Bazett* cannot substantiate the claim which he has made on the produce of these commissions.

It has been settled in various cases, on the ground of public policy, and it was admitted in the argument, that the pay of an officer in the army cannot be assigned by him to any other person. It is equally clear, that he has no right to alienate his commission; though, if he wishes to retire from the army, he may, under special circumstances, and through the medium of the commander in chief, obtain the leave of the crown to sell out for the regulation price. Undoubtedly, therefore, the commission itself was not alienable by Captain *Fallon*.

All that Captain *Fallon* did in the first instance was to deposit the commission itself with Mr. *Bazett*. This could at the utmost give a lien (if such a lien could be given) only on the parch-

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ment or paper of the instrument; and of that lien, such as it is, Mr. Bazett has the full benefit; for it appears by the Master's report, that the commissions are still in his hands.

[*475] *Then, by the deed of 1812, Captain Fallon consented that Bazett should be at liberty to sell the commission. That consent never could be enforced; neither does it appear that any attempt was made to act upon it. Bazett never could have been entitled to effect a sale: for no officer in the army can, without the permission of the crown, authorize any other person to sell his commission.

A covenant was likewise procured from Fallon that he would do no act to incumber the commission. That covenant undoubtedly still exists in due force, if any remedy upon it can be obtained.

It appears to me, therefore, that the deposit of the commission, even accompanied, as it subsequently was, by the covenants in the deed of 1812, could not give Mr. Bazett a specific lien on the purchase money, which might afterwards be paid by any other officer, to whom Captain Fallon, in consequence of permission granted by the commander in chief, might sell his captaincy of dragoons.

When the requisite permission was obtained in 1815, Captain Fallon had no communication with Mr. Bazett; nor was Mr. Bazett a party to the subsequent sale. Throughout the transaction Captain Fallon acted by his own authority. It was he who employed the plaintiffs to sell it; by them the sale was effected; into their hands the purchase money was paid. The money being thus paid to them, I do not see how Bazett could have maintained an action at law against them for money had and received on his behalf. On the contrary, it is admitted, that when the money came into the hands of the Messrs. Collyer, Captain Fallon had full authority to appropriate any part of it; [*476] and that authority he exercised *by appropriating a

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sum to those creditors whose preferable title has been already ratified by the court. The appropriation so made stands on grounds perfectly different from the present claim; for it was an appropriation, not of money *to be* received by the sale of a commission, but of money which had been actually received by the plaintiffs, and had become a debt due from them to him. The moment, therefore, that the memorandum, directing them to retain a sum of 1,160*l.* for the benefit of particular persons, was communicated to them, they became trustees of so much of the fund for the use of the persons thus specified. With respect to the residue, the case is different: for, unless Captain Fallon consented to the appropriation of it, as he had consented to the appropriation of the other sums, it could not but continue to be what it was when it first came into the hands of the agents—money had and received by them for his use. Did he then appropriate it to the discharge of Bazett's debt? quite the contrary. No sooner did Bazett give notice of his claim, than Fallon came forward to object to it, and to assert his right to dispose of the money as being received for his own use, and held solely for his own benefit.

If Bazett has no claim, it is clear, Fallon having taken the benefit of the Insolvent Act, that the money passed by the assignment to Sharkey, whose title as assignee, though not stated conclusively in the report, has been admitted at the bar.

*BINNINGTON *v.* HARWOOD.

[*477]

ROLLS.—1823: 16th and 18th December. 1824: 10th February. 1825: 25th February.

Where a decree ordered, that, in taking the accounts of a mortgagee in possession, annual rests should be made, and that the rents and profits of the premises, as often as they exceeded the interest accrued due on the debt, should be applied in reduction of the principal; a rest ought to be made at the date of the receipt by the mortgagee of a sum exceeding the interest, though occurring in the interval between the annual rests.

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From that date the subsequent annual rests ought to be computed.

An equity of redemption, being subject to a trust for sale, the mortgagee, with some of the *cestuis que trust* of the equity of redemption, filed a bill for the sale of the premises, alleging that the whole of his principal, with an arrear of interest, was due to him, and suppressing the fact, that he had been for several years in possession: the result of the account was, that nothing was due on the mortgage when the bill was filed: Held, that the mortgagee must pay to the defendants the costs of so much of the suit as related to the mortgage, and the accounts and inquiries concerning it.

CERTAIN freehold and copyhold premises, represented by the bill as being subject to a mortgage for 500*l.* to Eadon, were devised and appointed by Catharine Binnington, the owner of the equity of redemption, to two trustees upon trust to sell, and, after paying the mortgage and some other debts, to divide the residue of the produce among her five children equally. The original trustees being dead, and the legal estate in the premises having descended to two infants, Eadon, in conjunction with two of the five persons entitled beneficially to the equity of redemption, filed the original bill on the 12th of June, 1809, against the three other *cestuis que trust*, who were stated to be all out of the jurisdiction of the court, and against the two infant trustees. It alleged that the whole of the 500*l.*, with an arrear of interest, was due to Eadon upon his mortgage, and that he was willing to concur with his co-plaintiffs in a sale; and it prayed, among other things, that the freehold and copyhold premises might be sold; that, if necessary, an account might be taken of what was due to Eadon for principal and interest; and that his mortgage debt might be discharged out of the money to be raised by the sale.

[*478] *The answers disclosed a fact of which no mention was made in the bill, that Eadon had been for many years in possession of both the freehold and copyhold premises.

On the 6th of July, 1813, a decree was made, which, so far as Eadon or his claims were concerned, was the usual decree against a mortgagee in possession; containing the common directions, that the Master should tax him the costs of the suit, and set an annual value by way of rent upon the premises, with which he

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was to be charged during the time of his possession. Under this decree, varied in some collateral points by an order of the 13th of November, 1813, an occupation rent was fixed, and the estates were sold.

In the subsequent proceedings it appeared that the copyholds, of which Eadon had claimed to be mortgagee, were, in truth, not included in his mortgage; and it was further alleged by those who were opposed to him in interest, that his debt had been satisfied by the rents and profits which he had received before the filing of the bill, and that his conduct had been such as not to entitle him to the indulgence with which, in ordinary cases, the court treats a mortgagee. Accordingly, the matter was brought before the Lord Chancellor, by a petition for the rehearing of the original decree, and also a petition of appeal from an order made by the Vice-Chancellor. In this stage of the cause, the Lord Chancellor gave Eadon the option of being treated, with respect to the copyhold premises, either as a wrongdoer or as a mortgagee in possession; and, Eadon having elected to be dealt with in the latter character, a decree was pronounced, which, after ordering that some variations should be made in the former decree, and particularly that the clause providing for the taxation of Eadon's costs should be omitted, directed the following *words to be added to it: "And, it being ad- [*479] mitted that the said plaintiff, Francis Eadon, had been in possession of, or in the receipt of, the rents and profits of the said copyhold premises, and he submitting to be charged as a mortgagee in possession thereof, it is ordered that the Master do take an account of the rents and profits of the said copyhold premises received by the said Francis Eadon, or by any other person or persons by his order or for his use, or which, without his wilful default, might have been received thereout: and the said Master is to set an annual value by way of rent on the said copyhold premises for the time during which Francis Eadon has been in the possession or occupation thereof, according to which the said Francis Eadon ought to be charged, and the said Francis Eadon is to be charged therewith accordingly: and in taking the

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said account of the rents and profits, and the account directed by the said decree with respect to the freehold premises, the said Master is to make annual rests, and when and as often as the rents and profits of the said freehold and copyhold premises shall exceed the interest of the mortgage debt, it is ordered that the same be applied in reduction of the principal money due in respect of the said mortgage debt," &c.

The Master, in his report, made the first rest on the 5th of July, 1805, when he credited the mortgagee with 500*l.* for principal, and 75*l.* for three years' arrear of interest, and debited him with two sums of 246*l.* 1*s.* and 110*l.* 5*s.*, which had been received by him in the preceding February, for profits and arrears of rent of the premises.

To this report an exception was taken; and the exception, besides resisting the report on two other points, stated [*480] "that the Master had allowed 75*l.* for *three years' interest on the principal sum of 500*l.* in mortgage to the defendant Francis Eadon up to the 5th day of July, 1805, &c.; whereas the Master ought to have allowed interest on the said principal sum, not up to the 5th of July, 1805, but only up to the 2d of February, 1805, at which time he found that the said Francis Eadon received two sums of 110*l.* 5*s.* and 246*l.* 1*s.* for profits and arrears of rent of the mortgaged premises, and he ought then to have deducted such sums from the principal and interest of the mortgage."

The Master's reason for making the rests on the 5th of July was, that the mortgage deed bore date on the 5th of July, 1798. from which day the interest on the 500*l.* commenced.

Mr. *Agar* and Mr. *Knight*, for the exception :—By the words of the decree, the sums received in February, 1805, were to be applied forthwith, first, to the discharge of the then existing arrear of interest, and next to the diminution of the principal, The Lord Chancellor, in ordering annual rests to be made, in-

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tended a benefit and not a loss to the mortgagor; but he will be a sufferer, instead of being a gainer, by that which was meant to be beneficial to him, if the Master's mode of taking the account be correct. The mortgagee received these two sums in February: he is not charged with them till the 5th of July; and yet during all this period interest is computed upon the whole of his principal. The effect of such a mode of calculation is to allow him interest on the whole of the principal debt, after a large part of it has been paid.

Mr. *Horne* and Mr. *Wakefield*, for the report:—The decree in express terms directs the Master to make annual rests. Such a direction excludes all rests *which are not annual; and the exceptants, in fact, demand that the Master shall make other rests besides those ordered by the decree. [*481]

December 18th.—THE MASTER OF THE ROLLS:—Notwithstanding the elaborate discussion which this subject received in the case of *Raphael v. Boehm*,^(a) there is considerable doubt as to the effect of a direction to the Master to make annual rests in taking accounts. In the case of a mortgagee, however, I cannot yield to the arguments by which Mr. Eadon's counsel have endeavored to maintain the report. A mortgagee can never receive more than his principal and interest on it at the rate of five per cent. Now, if, in the early part of the year, a payment is made to him exceeding the interest which is then due, and he is, nevertheless, allowed interest on the whole of his principal down to the end of the year, what is the profit which he derives from his mortgage in the interval between the date of that payment and the date of the annual rest? It is clear that a part of his principal has been repaid to him, and yet he receives interest upon the whole of it: in other words he gets more than five per cent. on the sum for which he is actually a creditor. Suppose that the sum paid to Eadon on the 2d of February had been equal to the whole of the 500*l.*, with the arrears of interest calculated to that

(a) 11 Ves. 92.

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day, would he have been entitled to interest on the 500*l.* up to the 5th day of July? Is it possible that such should be the effect of a direction to make annual rests? The sums which a mortgagee in possession receives in respect of the mortgaged premises, at times intermediate between the dates of the annual rests, must be applied, when they exceed the interest, [*482] to the reduction of the principal; and, in *the present case, that course is clearly prescribed by the very words of the decree.

The order made was, "that the exception should be allowed, except as to the sum of 75*l.*; and as to the said sum of 75*l.* the exception was allowed as to so much as was composed of interest between the 2d of February and the 5th of July; and as to such interest and the other part of the exception, it was referred back to the Master to review his report."

The Master, in reviewing his report, made a rest on the 2d of February, 1805, and annual rests on the 2d of February in each succeeding year, and not, as he had before done on the 5th of July.

Eadon took an exception to the report thus reviewed; insisting that the Master, after having ascertained what was due on the mortgage on the 2d of February, ought to have computed interest thereon to the 5th of July, 1805, and thence to have settled the accounts by annual rests.

Mr. *Horne* and Mr. *Wakefield*, in support of the exception, argued, that the effect of the order on the former exceptions was merely to disallow certain items which the then report allowed to Eadon; so that under it, the Master could correct only those particular items, but had no power to model the accounts anew, or to vary the date of the annual rests

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1825: *February 25th*.—LORD GIFFORD, THE MASTER OF THE ROLLS, was of opinion that the report was right, and overruled the exception.

*The result of the account, as stated in the Master's [*483] final report, was that on the 2d of February, 1809, being the annual rest immediately preceding the 12th of June, 1809, which was the date of the filing of the bill, a balance of somewhat less than 12*l*. was all that remained due to Eadon upon his mortgage; and that, at the next annual rest, on the 2d of February, 1810, there was a considerable balance against him. The proportion of the occupation rent for the period between the 2d of February and the 12th of June, was greater than the sum due to him on the former day; so that, if he was to be considered as accountable on the 12th of June, for so much of the annual rent as was proportional to the part of the year which had then elapsed, he had been overpaid at the time when the bill was filed. Under these circumstances, the question arose, by whom should the costs of the suit be borne?

In the course of the proceedings, various suits both of revivor and of revivor and supplement, had become necessary, in all of which Eadon was a defendant.

Mr. Agar, Mr. Knight, Mr. Roupell and Mr. Garratt, for parties adverse in interest to Eadon:—As this, they argued, was in effect a suit for the payment of a pretended mortgage debt, which now appeared to have been overpaid at the time of filing the bill, it must be treated as a proceeding altogether unnecessary and improper; and it could not be entitled to more favor or indulgence than a foreclosure suit would have met with under similar circumstances. A mortgagee, who files a bill of foreclosure, when nothing is due to him, invariably pays costs; and, upon the same principle, the costs of the present suit must fall upon Eadon.

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[*484] *Mr. *Horne* and Mr. *Wakefield*, for Eadon :—This is not a bill of foreclosure, but a bill for the sale of the premises. The two *cestuis que trust*, who are co-plaintiffs with Eadon, had a right, as against the trustees and the other *cestui que trust*, to call for a sale ; but a sale could not take place without Eadon's consent, or considering the circumstances in which the property stood, be carried completely into effect without the interposition of this court. A suit, therefore, if not absolutely necessary, was at least proper ; to that suit Eadon was a necessary party ; if he had been a defendant, it would have been ridiculous to have talked of throwing the costs of the proceedings upon him ; and shall he fare the worse, because, out of his anxiety to save the estate the expense of an additional party, he has consented to be a co-plaintiff instead of a defendant ? It was the honest belief of all parties, at the time when the bill was filed, that there was a balance due to the mortgagee. Even upon the account, as it now stands, after every technical advantage has been taken of his situation, and he has been charged, as mortgagee in possession, with the rent of premises of which in truth he was not mortgagee, there was a balance due to him at the annual rest immediately preceding the institution of the suit.

THE MASTER OF THE ROLLS :—I cannot throw the costs of the whole suit upon Eadon. As this freehold and copyhold estate was subject to a trust for sale, it was undoubtedly competent to the owners of two-fifths of the equity of redemption to come to the court for the purpose of having the trust executed. So far as the suit had that object, I cannot say that it was instituted improperly ; and there is no evidence that Eadon had [*485] recourse to any improper *practices, or exercised any undue influence over the persons who became co-plaintiffs with him in the original suit, in order to induce them to concur with him in the proceedings.

But infinitely the greater part of the expenses of this suit has been occasioned by the accounts and inquiries relative to the mortgage debt ; and, to determine by whom this portion of the

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costs ought to be paid, we must inquire whether Eadon' has stated his case fairly in his bill. He has not stated it fairly. The bill contains not the slightest mention of the fact that he was then, and had been for many years, in possession of the premises; and it was the answers of the defendants which first disclosed that most important circumstance. Not only does Eadon suppress that which he ought to have stated; he likewise alleges that which ought not to have been alleged; for he asserts that the whole of his principal, with an arrear of interest, was then unpaid. The frame of the suit, too, is not unworthy of notice. All the owners of the equity of redemption, except those who are stated to be out of the jurisdiction of the court, are made co-plaintiffs with him; so that there was a great probability that if his accounts were gone into, no person beneficially interested in the result would be present at the investigation, except his own co-plaintiffs.

The accounts have now been taken against him, and from them it appears that when he filed the bill he had been overpaid by a few pounds. If he had filed a bill of foreclosure, the account would have been taken up to the day of filing the bill; and if it had turned out that on that day nothing was due to him, he must have borne the expenses of the suit which he had so improperly instituted. If, again, he had been made a *defendant to a bill calling for a sale of the premises, [*486] he would have been bound, in his character of mortgagee in possession, which carries with it the obligation of having accurate accounts always ready, to have stated in his answer the amount of his demand fairly; and if he had done so, the *cestui que trust*, finding that he had admitted himself to have been fully paid, might have declined to ask or prosecute any inquiries or accounts against him, and might have proceeded, without expense or delay, to a sale of the estate. That could not be done, because Eadon concealed the true state of the case; and it is his misconduct which has occasioned all the expense of the accounts and inquiries relative to his mortgage. Therefore, as between him on the one hand, and the defendants in the original suit and

 1823.—Del Pont v. De Tastet.

their representatives in the revived and supplemental suits on the other, he must pay to those defendants and their representatives the costs of so much of the proceedings in these causes as relate to his mortgage, and the accounts and inquiries concerning it.

As to the *cestuis que trust*, who were originally co-plaintiffs with Eadon, though I will not make them pay costs, I cannot give them costs against him.

DEL PONT v. DE TASTET.

1825: 19th and 20th December.

A few unnecessary words in a bill do not render it impertinent.

In a bill for an account, it is not impertinent to set out at length letters sent to the defendant demanding the account, though the bill contains a general allegation that applications have been made to the defendant to account, and the usual charge as to letters in the possession of the defendant.

THE plaintiffs in this case were Juan Jose Marco del Pont, a merchant at Madrid, and William Matthiessen, his attorney in this country, for the purposes *of this suit; and the principal object of the bill was to compel the defendant, a merchant in London, to account for the proceeds of some doubloons, alleged to have been remitted to him from Lima, on account of the plaintiff Del Pont. Various letters respecting the doubloons had been written by the defendant, in the French and Spanish languages, to the plaintiff Del Pont, and to some merchants at Hamburgh, who had acted as his agents in the business; and the bill set forth translations of different passages in these letters. The statement in the bill of each of these translations was introduced in the following manner: "That on or about &c., the defendant wrote and sent to, &c., a letter in the French, or, as the case might be, in the Spanish language, in which, according to an accurate translation of such letter into the English language, he, the defendant, expressed himself in the words and figures, or to the purport and effect, following,

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that is to say, &c. The bill also contained a long statement of the power of attorney by which the plaintiff Matthiessen was appointed the agent of the plaintiff Del Pont; and, in addition to the general allegation that application had been made to the defendant to account, and the usual charge as to letters, papers and writings in the possession of the defendant, it set out, by way of charge, two letters demanding the account required by the bill, which had been sent to the defendant by the solicitor of the plaintiffs shortly before the bill was filed.

The bill was referred for impertinence; and, on the 20th of November, 1822, the Master reported it to be impertinent, as to the principal part of the power of attorney, and as to the words "in the words and figures or," wherever they occurred as introductory to the translations of the letters.

*The defendant excepted to the report, insisting, that [*488] the Master ought to have found the bill to be impertinent as to the words, "according to an accurate translation of such letter into the English language," introductory to the translations of the letters: and as to the whole of the letters sent to the defendant by the plaintiffs' solicitor. The plaintiffs also excepted to the report, so far as it stated the bill to be impertinent as to the words "in the words and figures or," but they did not dispute the report as to the power of attorney.

The two sets of exceptions were heard before the Vice-Chancellor on the 20th of November, 1823, when his Honor ordered the defendant's exceptions to be overruled, and the plaintiffs' exceptions to be allowed.

From this order the defendant appealed to the Lord Chancellor; and the appeal now came on to be argued.

Mr. *Agar* and Mr. *Koe*, for the appellant, referred to Lord Coventry's^(a) and Lord Clarendon's^(b) orders against impertinence; and argued that, from the burden of the stamp duties, it

(a) *Beames' Orders*, 69.

(b) *Ibid*, 165.

1823.—*Del Pont v. De Tastet*

was now more incumbent upon the court to protect the suitors from prolixity in pleading. They insisted that it was unnecessary to set out the letters written by the plaintiff's solicitor, and said that the language of the bill, in the points excepted to, was such that it was impossible for the defendant to answer.

Mr. *Phillimore*, for the respondent, contended that though the words in question might be superfluous, they were not impertinent, and that impertinence, in the sense which the court [*489] applied to the words, was a *statement of irrelevant matter. He said that a particular answer, as to the letters written by his solicitor, might be most material to the plaintiff's case.

THE LORD CHANCELLOR:—There is a much greater degree of importance belonging to this question than there would be if it affected the present case only. The Masters have before represented to me, that it is absolutely necessary some step should be taken to prevent references for impertinence from being carried into their offices, without the responsibility of counsel. I do not enter into the question whether the demand made by this bill can be supported. It must be remembered, that if references of this nature can begin without some sanction that they are right, it may be, in very many cases, that, for the purpose of delay, impertinence will be suggested where the suggestion cannot be sustained. Much of the expense of proceedings in this court arises from the heavy burden of stamps; but I cannot agree that the mere existence of revenue laws can make any difference in the question, as to what is or is not to be considered impertinent. Looking at what has been the course of proceedings in this court ever since I can remember it, I cannot lay it down, that twenty words shall be considered impertinent, and that nineteen words shall not be considered impertinent: I am unable to form a rule more distinct than this, to put it to the honor of counsel to recollect, that there may be an oppressive use of a rule in itself calculated to prevent oppression, and that they owe it to the court to take care that there shall be none, to

 1823.—Willcox v. Bellaers.

say that, because there are here and there two or three unnecessary words, it is making a right use of a rule to prevent oppression to refer the bill for impertinence, is a thing the court ought not to endure. It *has been said, that [*490] from the language of this bill* there is difficulty in answering the questions, but I see no difficulty in answering them; not that the fact of there being difficulty in answering a question would necessarily make the question impertinent: by no means. With respect to the other part of the case, the letters written to the defendant, we have been in a great mistake ever since I remember the court if the statement of those letters is to be considered impertinent, because there is a general charge in the bill as to letters in the possession of the defendant; the defendant might say that these letters were not in his possession, but he might be well able to say whether he received them or not. Besides, it is not a fair thing to remind a man, by specifying the particulars of that to which you want a special answer, upon which answer your whole case may depend. Upon the whole, I am clearly of opinion that the Vice-Chancellor is right.

Order affirmed.

 *WILLCOX v. BELLAERS

[*491]

ROLLS.—1823: 24th December.

Where, in a suit by a vendor for specific performance, the Master reported in favor of the title, but the court, on an exception taken by the purchaser, deemed the title doubtful, an order was made dismissing the bill without costs, but neither allowing or disallowing the exception.

Construction of words of a devise as to giving an estate tail.

THOMAS WILLCOX, by his will, devised all his freehold and copyhold or customary messuages and hereditaments to his son Henry Thomas Willcox, during his life; then, after his decease, to such of his children, and in such shares and proportions as the said Henry Thomas Willcox should by his last will appoint, and to their heirs and for want of such appointment, and as to those

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parts of the premises of which no appointment should be made, to the heirs of the body of the said Henry Thomas Willcox and their heirs forever. In case Henry Thomas Willcox should die without issue, then, immediately from and after his decease, the testator devised the estate to his, the testator's daughter, Elizabeth Willcox, during her life, remainder to such of her children, and in such shares as she should appoint, and in default of appointment to the heirs of her body, and their heirs and assigns forever. "And in case my son," continued the testator, "shall live and have children as aforesaid, then I give and bequeath unto my said daughter Elizabeth the sum of 500*l.*, to be paid her on her attaining the age of twenty-one years, or day of marriage.' Then, after bequeathing to his daughter a legacy of 200*l.*, and to his wife an annuity of 10*l.* during her widowhood, the testator devised all the residue of his estate, after payment of debts, legacies, and funeral expenses, to his said son Henry Thomas Willcox, or, if he died under the age of twenty-one years, and without issue, to his, the testator's daughter Elizabeth.

[*492] *Henry Thomas Willcox was not the heir at law of the testator. Soon after he attained his full age, and before he had any issue, he suffered a recovery, the uses of which were declared to be to himself in fee. He afterwards contracted to sell the premises to the defendant, and the bill was filed to enforce the specific performance of that contract. Upon the coming in of the answer, an order was made referring the title to the Master: the Master reported in favor of the title, and upon exceptions to that report the question was now raised, whether Willcox, under the will and the recovery, could give a good conveyance of the fee.

Mr. *Sugden* and Mr. *Pemberton*, for the exception:—The vendor puts his case in two ways. He says, that either he is a tenant in tail under the will, and then he has acquired a fee by the recovery, or that he is tenant for life with contingent remainders in fee over, and then that, by the recovery, he has de-

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stroyed these contingent remainders, and takes the fee under the residuary clause.

The will gives the estate to him for life, then to his children in fee as he shall appoint, and in default of appointment "to the heirs of his body in fee." These words will not give him an estate tail; for to put such a construction upon them, would prevent the fee, which is expressly given, from taking effect; and, to give that fee effect, we must construe "heirs of the body" to mean children. The words "in case my said son Henry Thomas Willcox shall happen to die without issue," must be considered as meaning, not an indefinite failure of issue, but dying without issue at the time of the death of Henry Thomas, and, in that event, the testator, from and immediately after his son's decease, gives the premises to his daughter.

*This construction is further strengthened by the pro- [*493] vision made for the daughter. That provision was intended for the case in which she would not take the estate; and what was that case? "In case my son shall live and have children as aforesaid." The intention must have been, that if the son died and left children, his children should take a fee; if he died leaving no children, the limitations to the daughter and her children were to take effect.

Again, if it be contended that Henry Thomas Willcox was tenant for life, with contingent remainders over to his children on the one hand, if he had any, and if he had not, to the daughter and her children, we reply, that we cannot be compelled to take a title depending on the destruction of contingent remainders. In fact, however, the limitations to Elizabeth and her children may be construed to be executory devises.

The following cases were cited, *Doe v. Frost*,^(a) *Gretton v. Haward*,^(b) *Mesert v. James*.^(c)

(a) 3 B. 5106.

(b) 6 Taunt. 94.

(c) 1 B. & B. 484.

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Mr. *Preston* and Mr. *Barber* contended that the vendor took by the rules of law an estate tail, and that there did not occur in this will any words sufficient to exclude the operation of the legal rule. They relied on the case of *Doe v. Jesson*,^(a) as a decisive authority in their favor, and they cited *Goodright v. Pollyn*,^(b) *Frank v. Stovin*,^(c) *Measure v. Gee*,^(d) *Smith v. Death*,^(e) *Doe v. Scott*.^(g)

[*494] *Mr. *Sugden* in reply :—All the cases in which it has been held that a person described as a tenant for life, took an estate tail, depended on this principle, that there was a general gift over in default of a whole class of issue of that person, and that there were no words which could possibly have carried the estate through the whole of that class of issue, if taken by them as purchasers; and that, therefore, an estate of inheritance was given to the ancestor, in order that the estate might be carried through all that line of heirs who were clearly meant to take. But where the words were sufficient to carry the lands through the whole of that class of issue who were intended to take (as for instance where there were words sufficient to pass a fee), the court has never given, by construction, an estate of inheritance to the person named as tenant for life.

Doe v. Jesson^(h) has no connection with this case. There no words occurred which would give the estate to the whole line of issue, whom it was clearly the testator's intention to include, unless there was an estate tail in the first tenant for life; and accordingly the Court of King's Bench held that the issue took only as tenants for life. The House of Lords, on the other hand, held that the first tenant took an estate tail, because otherwise the intention of the testator could not be effectuated. Here there are words which may carry the estate through a whole line of issue, for a fee is given them.

(a) 5 Maule & Sel. 95; 2 Bligh. 1.

(b) 2 Lord Raymond, 147.

(c) 3 East, 548.

(d) 5 B. & A. 713.

(e) 5 Mad. 397.

(g) 3 M. & S. 300.

(h) 5 Maule & Sel. 95; 2 Bligh, 1.

 1823.—Willcox v. Bellaera.

1824: *December 23d.* 1825: *February 9th.*—The MASTER OF THE ROLLS stated that the case of *Doe v. Jesson* ought to be a lesson to the court on the *necessity of [*495] caution. There the King's Bench and the House of Lords had come to opposite conclusions with respect to the effect of certain words in creating an estate tail. He could not but consider that there was a very nice and doubtful question on the construction of the will on which the title of the present plaintiffs rested; and *Sheffield v. Lord Mulgrave*, (a) *Roake v. Kidd*, (b) and many other cases, showed that the court would not compel a purchaser to take a doubtful title, or to accept a case for the opinion of a court of law. Therefore, without either allowing or overruling the exceptions, and without expressing any opinion on the title, he thought the bill ought to be dismissed.

It appeared that only the exceptions had been set down, so that no order of dismissal could be pronounced. His Honor, therefore, ordered that the exceptions should still stand for judgment. The defendant then obtained by petition an order that the cause should be set down to be heard on further directions and costs, and that it should be advanced to be heard on the 9th of February, together with the exceptions which stood for judgment. On that day an order was made that the bill should be dismissed without costs, and that the deposit on filing the exceptions should be returned to the defendant.

The plaintiffs appealed.

1827.—*Lyndhurst*, Lord Chancellor, affirmed the order.

(a) 2 Ves. 528.

(b) 5 Ves. jun. 647.

 1823.—Const v. Harris.

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*CONST v. HARRIS.

1823: 12th and 31st May; 12th, 18th and 28th June; and 20th November. 1824: 6th, 7th and 19th February.

The court will entertain a bill to compel partners to act according to the provisions of instruments into which they have entered, and, where it will interfere for that purpose, will take care that the decree shall not be defeated by anything done in the meantime.

Thus, where in 1812, the then proprietors of Covent Garden Theatre executed a deed, by which they covenanted and agreed that the profits of the theatre should be exclusively appropriated to particular purposes, and that the treasurer for the time being should be irrevocably directed so to apply the profits, and in 1822, parties then entitled, under the former proprietors, to seven-eighths of the theatre entered into an agreement, which provided, in some respects, for a different application of the profits, and otherwise affected the rights of a party interested in the remaining eighth, who was not consulted on the subject, the court, upon a bill filed by that party, for the specific performance of the covenants and agreements contained in the deed of 1812, appointed a receiver.

Where a bill is filed to stay waste, and a demurrer is put in, the court will hear the demurrer immediately.

Where there is a case for a special injunction, and the injunction will operate for the benefit of parties not before the court, the absence of those parties, though made the ground of demurrer to the bill, will not prevent the court from interposing.

Where an executor has not assented to a specific bequest, the persons beneficially entitled are not necessary parties to a suit relating to the property specifically bequeathed.

The court will not appoint a receiver, or a manager, of any partnership concern, unless the suit be so framed, as that a decree may be made, either that the concern shall be carried on, according to the terms of an instrument, which, by the agreement of the parties, is to regulate the mode of its being carried on, or, that it shall be wholly put an end to.

Articles agreed on to regulate a partnership, cannot be altered without the consent of all the partners.

But the continuance or discontinuance of a practice, not stipulated for, or made the subject of covenant, must be decided by the majority of the partners.

The negative of the minority in such cases is of no avail, if they have had a proper opportunity of considering the matter.

An agreement by a majority of partners to overrule the minority, will not be permitted.

The court will not interfere on every breach of adherence to the rules of a partnership concern.

A bill merely seeking the interposition of the court to carry on a partnership cannot be maintained.

1823.—Const v. Harria.

A party, taking the share of a partner in a concern, cannot be let loose from the obligations that partner is under to the concern.

Partners may be held by their conduct to have changed the terms of a written agreement into which they have entered for carrying on the concern, and to have substituted the terms to which they have adhered, instead of the terms contained in the original agreement.

Parties claiming under a partner who has assented to the substituted terms, cannot revert back to the original terms.

A partner complaining that the other partners do not do their duty towards him must be ready to do his duty towards them.

Where, in carrying on a concern, there is any material change to be made, notice must be given to all parties of what the change is, and at what time it is to be taken into consideration.

The act of a majority of partners is the act of all, provided all are consulted, and the majority are acting *bona fide*.

Partners must act upon the joint opinion of all, and cannot exclude the judgment of any one.

The exclusion of a partner from his full share of management, the strongest ground for appointing a receiver.

The majority of partners never represents the whole body, except where there has been a voice called for from the minority.

The court will generally take the opinion of the minority to have been fairly overruled.

A proprietor of a theatre having demised his share without the consent of his co-proprietor, may obtain an injunction to restrain his lessees from doing any act prejudicial to such co-proprietor. *Semble*.

At the time of the destruction by fire of the late Theatre Royal, Covent Garden, Thomas Harris, John Philip Kemble, George White, Ann, the wife of John Martindale, or the trustees under her marriage settlement, and Henry Harris, were entitled to the theatre and the buildings, patent, property and effects belonging thereto, in the following shares or proportions; Thomas Harris to four eighth parts or shares thereof, John Philip Kemble to one eighth part or share, and one third of another eighth part or share thereof, George White to one eighth part or share thereof, Ann Martindale, or her trustees, to one eighth part or share thereof, and Henry Harris to the remaining two thirds of an eighth part or share thereof. After the destruction of the late theatre, a new theatre was built, and was furnished with the requisite scenery, property and effects, at the costs of the proprietors, according to their respective shares and interests.

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By an indenture, bearing date the 9th of March, 1812, and made between Thomas Harris of the first part, John Philip Kemble of the second part, George White of the third part, Ann Martindale of the fourth part, John Martindale of the fifth part, Henry Harris of the sixth part and John Brandon of the seventh part,—after reciting to the effect aforesaid, and further [*497] reciting, *that, in order to secure the payment of moneys then due and owing from the said proprietors, on account of the building, and newly furnishing, and otherwise on account of the theatre, several bills of exchange had been accepted by some of the proprietors, on behalf of themselves and the others of them, and several bonds had been made and entered into by all the proprietors, and that, previously to the execution of the said bonds, it had been stipulated and agreed by and between the proprietors, that, for the purpose of providing for the due and regular payment of the said bills of exchange, and of the moneys secured by the said bonds, the funds of the theatre should be exclusively bound and appropriated, and the treasurer for the time being should be irrevocably directed to make such appropriation and application of the moneys to come to his hands, as thereafter mentioned and expressed, and also reciting, that John Brandon was the then present treasurer of the theatre, the said Thomas Harris, John Philip Kemble, George White, Ann Martindale and Henry Harris, irrevocably ordered, directed and appointed, that the treasurer for the time being of the theatre should, from time to time, pay, apply and dispose of the moneys, which should from time to time come to his hands as such treasurer, first, in payment of the outgoings attendant upon the theatre, and the management thereof, and of all other debts then due on account of the theatre, and to the payment of which the proprietors then were, or should or might be jointly liable; secondly, in payment of 1,000*l.*, in part of a debt then due on account of the building of the theatre; and thirdly, in or towards the discharge of the moneys secured by the said bills of exchange and bonds, as the same should respectively become due, until all the said bills of exchange, and the moneys secured by the said several bonds, should be fully paid and satisfied, subject

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nevertheless *to the *proviso* thereafter contained; and [*498] the said Thomas Harris, John Philip Kemble, George White, John Martindale, Ann Martindale and Henry Harris, mutually covenanted, that they, their executors, administrators, appointees, or assigns, would not, on any pretence whatever, divert or prevent any money belonging to the theatre, on the general account thereof, from coming to the hands of the treasurer for the time being, and would not receive or take any money, which should thereafter come to the hands of the treasurer for the time being on the general account of the theatre, contrary to the application, order, direction and appointment therein contained, and the true intent and meaning of the indenture, and would not in any wise interfere with the payments or applications thereby directed to be made by the treasurer, or impede or interrupt the course of such payments or applications; and also, that no payment or division of any money, as or for the net gains and profits of the theatre, should be made to or between any of the said proprietors, until after the several payments, by the said indenture provided to be made to the creditors of the theatre, whose debts were secured by the said bills of exchange and bonds, should have been fully satisfied, and until after the treasurer of the theatre for the time being should have made up his account to the close of the theatre, at the end of the then present and every future season thereof, and should have delivered to the said proprietors, or such of them as should have required the same, such copies or duplicates of each and every such account as had been usually delivered; subject nevertheless to a *proviso*, that if, upon the making up of any such general annual account, at the close of the then present or any future season, whilst any of the moneys secured by the said bills of exchange or bonds should remain unpaid, it should appear, that, after paying or appropriating *moneys, actually remaining in [*499] the hands of the bankers employed for the theatre, sufficient for the payment of the outgoings attendant upon the theatre and the management thereof, which were usually paid about the close of the theatre in each season, and of such of the sums secured by the said bills of exchange and bonds, as should have

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become due previous to the making up of such general annual account, any surplus should remain in the hands of the treasurer, on account of the general gains and profits of the theatre, two thirds of such surplus should, with the consent in writing of the major part in value of the proprietors for the time being, be divided between the said proprietors, according to their respective shares and interests, and the remaining third of such surplus should continue as a fund, to provide for the future outgoings and moneys by the said indenture directed to be paid and discharged by the treasurer. The indenture also contained a covenant by Brandon, that he would, whilst he continued to be the treasurer of the theatre, apply the moneys then already received and unapplied, and which should from time to time come to his hands as such treasurer, in the manner, and for the purposes, by the said indenture directed, and in no other manner, and for no other purpose whatever.

George White died in December, 1813, having, by his will, appointed James Trotter and William Harrison to be his executors, and directed his share of the theatre to be sold, and the produce thereof divided between his two daughters, Elizabeth Percy, afterwards the wife of John Saltren Willett, and Letitia Mary, afterwards the wife of John Forbes.

Thomas Harris died in October, 1820, having, by his [*500] will, bequeathed his share of the theatre to the *said Henry Harris, whom he appointed to be his sole executor.

John Philip Kemble, in November, 1820, assigned his share of the theatre to Charles Kemble.

John Martindale died in October, 1814, and, upon his death, Ann Martindale became entitled to the uncontrolled dominion of her share of the theatre. She died some time in August, 1821, having, by her will, dated the 17th of December, 1818, bequeathed the said share to Francis Const for life, with remainder over, and appointed Francis Const to be her sole executor.

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Thomas Harris, for many years previous to his death, had the entire management of the concerns of the theatre, without any interference on the part of the other proprietors; and on his death Henry Harris succeeded to the exclusive management, without the other proprietors objecting thereto; but John Saltren Willett, John Forbes and Charles Kemble, afterwards became dissatisfied with Henry Harris' management, and various disputes and differences thereupon arose between the parties, which terminated in an agreement, bearing date the 11th of March, 1822.

By that agreement, which was made between Henry Harris of the one part, and John Saltren Willett, John Forbes and Charles Kemble, of the other part, Henry Harris, so far as the agreements therein contained were to be performed by or were applicable to him, and John Saltren Willett, John Forbes and Charles Kemble, so far as the agreements therein contained were to be performed by, or were applicable to them, or any of them, or to Francis Const, or the estate of Ann Martindale, mutually agreed, that the undivided shares of them, the parties *thereto, being equal to seven-eighths, of and in the [*501] theatre, and the buildings, scenery, machinery, wardrobe, dramatic pieces, articles, property and effects belonging thereto, and of and in the patent and licenses, by virtue of which the performances at the theatre were exhibited, should be vested in William Harrison, subject to certain leases therein mentioned, and amongst others, to a lease of one of the private boxes, for alternate weeks, at the yearly rent of 210*l.*, to a lease of the fruit rooms, at the yearly rent of 500*l.*, and to a lease for thirteen nights in each year, of the parts of the theatre commonly used for oratorios, at the yearly rent of 650*l.*, upon trust, that he, William Harrison, immediately after the said shares and premises should be so vested in him, should, with the consent of Henry Harris, make a lease thereof, subject as aforesaid to John Saltren Willett, John Forbes and Charles Kemble, their executors, administrators and assigns, to take effect, as from the day next before the day of the date of the agreement, for the term of ten

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years, to be computed from the 1st of August, 1821, at the yearly rent of 10,500*l.*, payable to William Harrison. The agreement provided, that the lease should also be made subject to the payment of the ground rents, and other outgoings of the theatre, and that it should contain, amongst others, the following covenants and provisos: covenants by the lessees for the payment of the whole of the ground rents and other outgoings; for the repair and preservation of the theatre, and of the scenery, machinery, wardrobe, dramatic pieces and other effects, and of any additions which might be made thereto; and for liberty to William Harrison to enter and see the state of repairs; covenants for regulating the performances at the theatre, and the purposes [*502] for which it was to be used; provisos that any *excess which there might be in the quantity of the wardrobe, at the end of the term, should be taken by the proprietary at a valuation; and that if the lessees should set up a printing press, or any other machinery in the theatre, not being fixtures of such a nature as would belong to the ground landlord, the same, unless removed by the lessees, should also at the termination of the term, be taken by the proprietary at a valuation, and that the amount of such valuation should be considered as a debt due from the proprietary; a proviso, that if there should be a partial loss by fire, the amount should be ascertained, and that if the amount should exceed 5,000*l.*, the lease should be void, unless Henry Harris and the lessees should agree to continue it, but that, if the amount should not exceed 5,000*l.*, or if it should exceed that sum, and it should be agreed to continue the lease, the lessees should expend the amount in making good the loss, and that the sum expended should be considered a debt from the proprietary, and that the payment thereof, with interest at 5 *per cent.*, should be provided for in the same manner, as thereafter mentioned with respect to the general debt; and a further proviso, that nothing in the lease should oblige the lessees, as between them and Const, and the estate of Martindale, to pay Const's or Martindale's proportion of the ground rents or other outgoings, or to bear Const's or Martindale's proportion of the repairs, or to prejudice the remedies of the lessees in respect

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The court will entertain a bill to compel partners to act according to the provisions of instruments into which they have entered, and, where it will interfere for that purpose, will take care that the decree shall not be defeated by anything done in the meantime.

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Where, in carrying on a concern, there is any material change to be made, notice must be given to all parties of what the change is, and at what time it is to be taken into consideration.

The act of a majority of partners is the act of all, provided all are consulted, and the majority are acting *bona fide*.

Partners must act upon the joint opinion of all, and cannot exclude the judgment of any one.

The exclusion of a partner from his full share of management, the strongest ground for appointing a receiver.

The majority of partners never represents the whole body, except where there has been a voice called for from the minority.

The court will generally take the opinion of the minority to have been fairly overruled.

A proprietor of a theatre having demised his share without the consent of his co-proprietor, may obtain an injunction to restrain his lessees from doing any act prejudicial to such co-proprietor. *Semble*.

At the time of the destruction by fire of the late Theatre Royal, Covent Garden, Thomas Harris, John Philip Kemble, George White, Ann, the wife of John Martindale, or the trustees under her marriage settlement, and Henry Harris, were entitled to the theatre and the buildings, patent, property and effects belonging thereto, in the following shares or proportions; Thomas Harris to four eighth parts or shares thereof, John Philip Kemble to one eighth part or share, and one third of another eighth part or share thereof, George White to one eighth part or share thereof, Ann Martindale, or her trustees, to one eighth part or share thereof, and Henry Harris to the remaining two thirds of an eighth part or share thereof. After the destruction of the late theatre, a new theatre was built, and was furnished with the requisite scenery, property and effects, at the costs of the proprietors, according to their respective shares and interests.

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By an indenture, bearing date the 9th of March, 1812, and made between Thomas Harris of the first part, John Philip Kemble of the second part, George White of the third part, Ann Martindale of the fourth part, John Martindale of the fifth part, Henry Harris of the sixth part and John Brandon of the seventh part,—after reciting to the effect aforesaid, and further [*497] reciting, *that, in order to secure the payment of moneys then due and owing from the said proprietors, on account of the building, and newly furnishing, and otherwise on account of the theatre, several bills of exchange had been accepted by some of the proprietors, on behalf of themselves and the others of them, and several bonds had been made and entered into by all the proprietors, and that, previously to the execution of the said bonds, it had been stipulated and agreed by and between the proprietors, that, for the purpose of providing for the due and regular payment of the said bills of exchange, and of the moneys secured by the said bonds, the funds of the theatre should be exclusively bound and appropriated, and the treasurer for the time being should be irrevocably directed to make such appropriation and application of the moneys to come to his hands, as thereafter mentioned and expressed, and also reciting, that John Brandon was the then present treasurer of the theatre, the said Thomas Harris, John Philip Kemble, George White, Ann Martindale and Henry Harris, irrevocably ordered, directed and appointed, that the treasurer for the time being of the theatre should, from time to time, pay, apply and dispose of the moneys, which should from time to time come to his hands as such treasurer, first, in payment of the outgoings attendant upon the theatre, and the management thereof, and of all other debts then due on account of the theatre, and to the payment of which the proprietors then were, or should or might be jointly liable; secondly, in payment of 1,000*l.*, in part of a debt then due on account of the building of the theatre; and thirdly, in or towards the discharge of the moneys secured by the said bills of exchange and bonds, as the same should respectively become due, until all the said bills of exchange, and the moneys secured by the said several bonds, should be fully paid and satisfied, subject

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nevertheless *to the *proviso* thereafter contained; and [*498] the said Thomas Harris, John Philip Kemble, George White, John Martindale, Ann Martindale and Henry Harris, mutually covenanted, that they, their executors, administrators, appointees, or assigns, would not, on any pretence whatever, divert or prevent any money belonging to the theatre, on the general account thereof, from coming to the hands of the treasurer for the time being, and would not receive or take any money, which should thereafter come to the hands of the treasurer for the time being on the general account of the theatre, contrary to the application, order, direction and appointment therein contained, and the true intent and meaning of the indenture, and would not in any wise interfere with the payments or applications thereby directed to be made by the treasurer, or impede or interrupt the course of such payments or applications; and also, that no payment or division of any money, as or for the net gains and profits of the theatre, should be made to or between any of the said proprietors, until after the several payments, by the said indenture provided to be made to the creditors of the theatre, whose debts were secured by the said bills of exchange and bonds, should have been fully satisfied, and until after the treasurer of the theatre for the time being should have made up his account to the close of the theatre, at the end of the then present and every future season thereof, and should have delivered to the said proprietors, or such of them as should have required the same, such copies or duplicates of each and every such account as had been usually delivered; subject nevertheless to a *proviso*, that if, upon the making up of any such general annual account, at the close of the then present or any future season, whilst any of the moneys secured by the said bills of exchange or bonds should remain unpaid, it should appear, that, after paying or appropriating *moneys, actually remaining in [*499] the hands of the bankers employed for the theatre, sufficient for the payment of the outgoings attendant upon the theatre and the management thereof, which were usually paid about the close of the theatre in each season, and of such of the sums secured by the said bills of exchange and bonds, as should have

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become due previous to the making up of such general annual account, any surplus should remain in the hands of the treasurer, on account of the general gains and profits of the theatre, two thirds of such surplus should, with the consent in writing of the major part in value of the proprietors for the time being, be divided between the said proprietors, according to their respective shares and interests, and the remaining third of such surplus should continue as a fund, to provide for the future outgoings and moneys by the said indenture directed to be paid and discharged by the treasurer. The indenture also contained a covenant by Brandon, that he would, whilst he continued to be the treasurer of the theatre, apply the moneys then already received and unapplied, and which should from time to time come to his hands as such treasurer, in the manner, and for the purposes, by the said indenture directed, and in no other manner, and for no other purpose whatever.

George White died in December, 1813, having, by his will, appointed James Trotter and William Harrison to be his executors, and directed his share of the theatre to be sold, and the produce thereof divided between his two daughters, Elizabeth Percy, afterwards the wife of John Saltren Willett, and Letitia Mary, afterwards the wife of John Forbes.

Thomas Harris died in October, 1820, having, by his [*500] will, bequeathed his share of the theatre to the *said Henry Harris, whom he appointed to be his sole executor.

John Philip Kemble, in November, 1820, assigned his share of the theatre to Charles Kemble.

John Martindale died in October, 1814, and, upon his death, Ann Martindale became entitled to the uncontrolled dominion of her share of the theatre. She died some time in August, 1821, having, by her will, dated the 17th of December, 1818, bequeathed the said share to Francis Const for life, with remainder over, and appointed Francis Const to be her sole executor.

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Thomas Harris, for many years previous to his death, had the entire management of the concerns of the theatre, without any interference on the part of the other proprietors; and on his death Henry Harris succeeded to the exclusive management, without the other proprietors objecting thereto; but John Saltren Willett, John Forbes and Charles Kemble, afterwards became dissatisfied with Henry Harris' management, and various disputes and differences thereupon arose between the parties, which terminated in an agreement, bearing date the 11th of March, 1822.

By that agreement, which was made between Henry Harris of the one part, and John Saltren Willett, John Forbes and Charles Kemble, of the other part, Henry Harris, so far as the agreements therein contained were to be performed by or were applicable to him, and John Saltren Willett, John Forbes and Charles Kemble, so far as the agreements therein contained were to be performed by, or were applicable to them, or any of them, or to Francis Const, or the estate of Ann Martindale, mutually agreed, that the undivided shares of them, the parties *thereto, being equal to seven-eighths, of and in the [*501] theatre, and the buildings, scenery, machinery, wardrobe, dramatic pieces, articles, property and effects belonging thereto, and of and in the patent and licenses, by virtue of which the performances at the theatre were exhibited, should be vested in William Harrison, subject to certain leases therein mentioned, and amongst others, to a lease of one of the private boxes, for alternate weeks, at the yearly rent of 210*l.*, to a lease of the fruit rooms, at the yearly rent of 500*l.*, and to a lease for thirteen nights in each year, of the parts of the theatre commonly used for oratorios, at the yearly rent of 650*l.*, upon trust, that he, William Harrison, immediately after the said shares and premises should be so vested in him, should, with the consent of Henry Harris, make a lease thereof, subject as aforesaid to John Saltren Willett, John Forbes and Charles Kemble, their executors, administrators and assigns, to take effect, as from the day next before the day of the date of the agreement, for the term of ten

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years, to be computed from the 1st of August, 1821, at the yearly rent of 10,500*l.*, payable to William Harrison. The agreement provided, that the lease should also be made subject to the payment of the ground rents, and other outgoings of the theatre, and that it should contain, amongst others, the following covenants and provisos: covenants by the lessees for the payment of the whole of the ground rents and other outgoings; for the repair and preservation of the theatre, and of the scenery, machinery, wardrobe, dramatic pieces and other effects, and of any additions which might be made thereto; and for liberty to William Harrison to enter and see the state of repairs; covenants for regulating the performances at the theatre, and the purposes

[*502] for which it was to be used; provisos that any *excess which there might be in the quantity of the wardrobe, at the end of the term, should be taken by the proprietary at a valuation; and that if the lessees should set up a printing press, or any other machinery in the theatre, not being fixtures of such a nature as would belong to the ground landlord, the same, unless removed by the lessees, should also at the termination of the term, be taken by the proprietary at a valuation, and that the amount of such valuation should be considered as a debt due from the proprietary; a proviso, that if there should be a partial loss by fire, the amount should be ascertained, and that if the amount should exceed 5,000*l.*, the lease should be void, unless Henry Harris and the lessees should agree to continue it, but that, if the amount should not exceed 5,000*l.*, or if it should exceed that sum, and it should be agreed to continue the lease, the lessees should expend the amount in making good the loss, and that the sum expended should be considered a debt from the proprietary, and that the payment thereof, with interest at 5 *per cent.*, should be provided for in the same manner, as thereafter mentioned with respect to the general debt; and a further proviso, that nothing in the lease should oblige the lessees, as between them and Const, and the estate of Martindale, to pay Const's or Martindale's proportion of the ground rents or other outgoings, or to bear Const's or Martindale's proportion of the repairs, or to prejudice the remedies of the lessees in respect

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thereof, against Const's or Martindale's estate, or to give the latter respectively any benefit. The agreement further provided, that Harrison should stand possessed of the reserved rent of 10,500*l*. and of the sums which Const, or the estate of Martindale, should from time to time pay to him, as thereafter mentioned, upon trust, after payment of all expenses, costs and charges, attending the trusts, *to pay the existing [*503] general debt, due from the general proprietary of the theatre, on account thereof, up to the day next before the day of the date of the agreement, with interest on such parts of the said debt as carried interest, the different sums composing the said debt and the interest thereof, to be paid in such order, and with such priority, and in such manner as Henry Harris and the lessees might mutually agree on and direct, and, in default of such agreement and direction, as Harrison might deem most advantageous for the proprietors of the theatre, taking into view in the first place, as far as the trust fund would allow, the discharge of debts bearing interest: and, subject to the trusts aforesaid, it was provided, that the reserved rent of 10,500*l*. and trust moneys, should be paid to the proprietors of the demised shares, according to their respective shares and interests in the theatre. The lessees, by the agreement, engaged that no part of the profits of the one-eighth share of Const, or the estate of Martindale, should be paid over, until after the full discharge of the debt, interest and expenses provided for by the trusts, and that, in case they should come to an arrangement with Const as to his one-eighth, it should, as between the parties thereto, be accounted for at the like rate of rent as was thereby agreed on, and that, from time to time, as Harrison should receive any payment in respect of the reserved rent, Const, or the estate of Martindale, should be applied to for a sum equal to one-seventh of every such payment, to the intent that all the proprietors of the theatre might bear an equal proportion of the existing general debt on account of the theatre: they also engaged, that, at the determination of the term, all the original, substituted and additional chattels should be left with the theatre, without prejudice to, or the same being delayed by, any claim on the part of Const, or

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be part of the general receipts and profits of the theatre, and, as such, applicable according to the trusts of the said deed of the 9th of March, 1812. It then traced the devolution of the shares of the parties who were interested in the theatre when that deed was executed, alleging that the defendants Willett and Forbes had become entitled to George White's share, as well in respect of the rights vested in their respective wives, as by virtue of some agreement or arrangement made by them with the executors of White; and after noticing the disputes with Harris, and the treaty for the agreement of the 11th of March, 1822, it alleged that the plaintiff took no part in the said disputes, and that having merely a beneficial life interest in his eighth part of the theatre, and being unwilling to commit himself in the execution of his duties as executor of the said Ann Martindale, he refused to become a party to the agreement. It then proceeded to state, that the agreement was concluded between the other parties; that, upon the same being concluded, the defendants Kemble, Willett and Forbes, entered into the possession of the theatre, and took upon themselves the entire management and conduct of the concerns thereof; that, for nearly a century [*507] previous to the said *last-named defendants undertaking the management of the concerns of the theatre, it had been the invariable custom, for the treasurer for the time being of the theatre, every day, during the continuance of each season, on which the theatre was open, to make out an account, containing the amount of the receipts of the theatre on the previous night, and of the daily payments made on account of the expenses of the theatre, and that such account was afterwards printed, and a printed copy thereof sent to each of the proprietors; that, for some time after the commencement of the management of the last-named defendants, the printed daily accounts continued to be furnished as usual to the plaintiff; and that, shortly after the commencement of the said management, the plaintiffs discovered that great part of the receipts of the theatre, instead of being applied according to the deed of the 9th of March, 1812, was, in violation of the covenants contained in that deed, grossly misapplied to other purposes, and, amongst other

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instances of such misapplication, it particularly referred to the receipt by Henry Harris of the rents of the private box and fruit rooms and of the oratorio rent, by the agreement of the 11th of March, 1822, reserved to him. It then went on to state, that, in order to enable them to make such misapplication of the receipts of the theatre, the defendants, Kemble, Willett and Forbes, soon after they undertook the management of the theatre, dismissed Brandon, who had given security for the due application of the receipts of the theatre according to the deed of the 9th of March, 1812, from the situation of treasurer, and appointed Robertson to be treasurer in his place, and that Robertson had given no security, and applied the receipts according to the direction of the last-named defendants, and without any regard to the provisions of the last-mentioned deed; and it further stated, that it had always been customary for the proprietors *to [*508] insure the theatre, to an amount at least sufficient to satisfy the outstanding liabilities, but that the theatre was not then insured; and after charging that, in January, 1823, the defendants ordered Robertson not to furnish the plaintiff with the usual daily accounts, under the pretence that the plaintiff might at any time attend at the theatre and inspect such accounts, it further charged, that, as one of the proprietors of the theatre, the plaintiff was entitled to have such accounts sent to him daily for his examination, but that Robertson, in obedience to the orders of the defendants, had not sent to the plaintiff any such accounts since the 22d of January, 1823, and had not, though required so to do, sent to the plaintiff the annual account made up to the end of the last season, as had been usual and customary. The prayer was, that the defendants might be decreed to abide by, and specifically to perform the several agreements and covenants contained in the indenture of the 9th of March, 1812; and that such agreements might be carried into execution under the direction of the court; that accounts might be taken of the debts provided for by that indenture, which then remained unsatisfied, of the produce and profits which had arisen and been received from the theatre since the defendants removed Brandon from being the treasurer or receiver, and of the application

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of such produce and profits; that all the defendants who had received or concurred in the receipt and application of such produce and profits might be declared to be personally liable to make good the sums so received, in so far as the same had been applied and appropriated to purposes inconsistent with the provisions and agreements of the said indenture; and that the defendants might be restrained from applying, or permitting to be applied, any of the rents, issues, produce and profits of the theatre and other premises, to any other purposes, than such as [*509] *were provided and agreed upon by the said indenture; and that a receiver or treasurer of the theatre might be appointed, with proper directions for enabling him to receive and apply such rents, produce and profits according to the trusts of such indenture; that, when and as the said debts should be paid and satisfied, the plaintiff, and the several other persons entitled thereto, might be let into possession, and receipt and enjoyment of their respective proportion of the rents, produce and profits of the theatre; and that, in the meantime, the defendants might be restrained from conducting and managing the concerns of the theatre, contrary to or in violation of the provisions and agreements contained in the said indenture, and from excluding the right of interference on the part of the plaintiff, as reserved by the terms of the said indenture, to each and every the proprietors of the theatre; and if necessary, that a proper person might be appointed to have the management and conduct of the concerns of the theatre until all the said debts, provided for by the said indenture, should have been fully paid and satisfied.

On the 30th of April, 1823, the defendants Kemble, Harrison, Forbes and Willett, put in a demurrer to the bill, assigning as causes of demurrer, first, that Elizabeth Percy and Letitia Mary, the wives of the defendants Willett and Forbes, and, secondly, that the parties entitled in remainder under the will of Ann Martindale, were not made parties to the suit; and on the 5th of May, 1823, a similar demurrer was put in by the defendant Trotter.

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On the 3d of May, 1823, the plaintiff gave notice of a motion, before the Vice-Chancellor, for an injunction, to restrain the defendants from applying, or permitting to be applied, any of the moneys to be received for or in *respect of the [510] theatre, and other the premises in the pleadings mentioned, to any other purposes, than such as were provided and agreed upon in and by the said indenture of the 9th of March, 1812, and for a reference to the Master to appoint a proper person or persons to act, as, or in the nature of a receiver and treasurer of the theatre, under the authority of the court, for the purpose of receiving the moneys, which should from time to time be received for admission to the theatre, or become or be payable in respect of the rents in the pleadings mentioned.

The motion was opened before the Vice-Chancellor, on the 9th of May, 1823, and was refused with costs.(a) On the same day, the plaintiff gave notice of a motion, before the Lord Chancellor, that the Vice-Chancellor's order of the 9th of May might be discharged, and that an order might be made according to the original notice of motion.

The allegations of the bill were verified by an affidavit of the plaintiff, in support of the motion. The defendants Kemble, Willett and Forbes, by an affidavit, in opposition to the motion, stated that they were ignorant of the existence of the deed of the 9th of March, 1812, until the filing of the bill, and that they believed that the said deed had not been acted upon for many years, but had been considered as dormant, and as a dead letter by the parties thereto, the material purposes for which the same had been made having been long since carried into effect; and they said, that they believed that all the *bills [511] of exchange and bond debts, provided for by the said

(a) The merits of the case were not discussed before the Vice-Chancellor, but his Honor refused the motion, upon the ground that the pendency of the demurrers prevented it from being made; and also refused to permit the demurrers to be advanced, and heard with the motion, unless special cause was shown. See *Jones v. Taylor*, 2 Madd. Rep. 181.

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deed had been paid, except a small part of the bond debts, for the payment of which arrangements had been made and time given; they further stated, that several meetings took place, pending the disputes with Henry Harris referred to by the bill, that the plaintiff personally assisted at one of those meetings, and that, before the 11th of March, 1822, the plaintiff was apprised of the substance and result of the other meetings, and of the arrangement finally made with Henry Harris, and they said, that the plaintiff expressed no dissatisfaction at the nature of the said arrangement, but acquiesced in and approved of the same, so far as it bound the parties thereto: they also stated, that application was made to the plaintiff to become a party to the said arrangement with Henry Harris, and that when he declined so to do, he from time to time stated, that he was merely the executor of Ann Martindale, and that he would not do, or join in any act, whereby he might make himself personally liable, or further liable than the assets of Ann Martindale might make him, and that the plaintiff had expressly stated, that he would not be a proprietor or partner in the theatre, or its concerns, and had and would purposely avoid being or becoming a partner or proprietor therein, and they said, that in March, 1822, some of the creditors of the theatre having become pressing for their demands, the plaintiff was informed that an advance of money on the part of the proprietors would be necessary, and that the plaintiff then refused to make any advance; they stated that the material object for which the said arrangement with Henry Harris was entered into, was to provide a fund, not liable to contingent expenses, to be applied in liquidation of the general debt due on account of the theatre, and that it had been originally proposed, that a lease of the whole of the theatre should be granted to them, the defendants, [*512] at the clear annual *rent of 12,000*l.*, but, that in consequence of the plaintiff's having declined to concur, it was finally arranged, that the lease should be of seven-eighths only, at the proportionate rent of 10,500*l.*, and that such rent, and the profits of Ann Martindale's share, or a sum of 1,500*l.* as a ratable sum in respect of her one-eighth, should be applied in liquidation of the debt; and they said, that the rent of 12,000*l.*

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a year was a competent and sufficient rent for the theatre, and that the actual profits, from March, 1822, had not been equal to that rent; they then stated that Thomas Harris, whilst he was manager of the theatre, had been allowed 1,000*l.* a year for the trouble of management, pursuant to an agreement signed by Ann Martindale and other proprietors, and that Henry Harris had retained the like annual sum during his management, and that, by the arrangement which they had made, the theatre had been exonerated from that charge; and they said, that with the exception of the rents received by Henry Harris under the arrangement, the whole of the receipts of the theatre, from the 11th of March, 1822, had been applied to the payment of the current expenses of the theatre, and of the debts due from it previous to the said 11th of March, and that the amount of such debts had been thereby greatly reduced, and that the defendants Willett and Forbes had also, since the said 11th of March, made large advances, out of their own private moneys, in payment of the said debts; they denied any improper motive in dismissing Brandon from the treasurership, and said, that he had been dismissed in consequence of his having been found incapable of doing his duty personally, and that the plaintiff had recommended his dismissal, and that at the time of such dismissal, they, the defendants, were not aware of the existence of the deed of 1812, or that Brandon had given any security for the application of the receipts of the theatre, *and that the plain- [*518] tiff had never given any intimation of the existence of any such security. The statement of the affidavit of the defendants, as to the daily printed accounts, was, that since they, the defendants, had undertaken the management of the theatre, such accounts had not been furnished to any of the proprietors, except the plaintiff, and that the delivery of such accounts had been discontinued, in consequence of its having been discovered that the same had been made public, and had been known to several persons connected with Drury Lane Theatre, but the affidavit stated, that the said daily accounts were regularly made out, and kept at the treasury office of the theatre, and that the plaintiff had the power of informing himself fully of the accounts

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and transactions of the theatre, by attending at the said office, where all the books and accounts were open for his inspection, and that the plaintiff had had notice to that effect, and since the suspension of the delivery of the daily accounts, had personally attended at the theatre, and inspected the books; after further stating, that in the course of their management, they had paid the current expenses and outgoings of the theatre, in due course, and according to the custom and practice thereof, and the credit usually given, and that there was no debt owing in respect of the said current expenses and outgoings, except such, as according to the aforesaid custom, practice and credit, were not then due, the said defendants, by their affidavit, said, that it had never been their wish to prevent the plaintiff from superintending the concerns of the theatre, but that on the contrary, they had frequently applied to him for his advice and assistance.

May 12th.—Upon the motion being opened, the counsel for the defendants objected to its proceeding until the demurrers [*514] were disposed of, and the LORD CHANCELLOR said *that, according to his recollection, it had been held that if a bill was filed to stay irreparable waste, and a demurrer was put in, the motion to stay waste could not be proceeded with until the demurrer was got rid of, but the court would hear the demurrer immediately. The counsel for the plaintiff, however, submitted that the rule in question applied only where the bill was demurred to generally for want of equity, and did not reach the case before the court, where the demurrer was for want of parties merely. The papers were then handed up to the Lord Chancellor, who this day (*May 31st*) said he thought that the wives of the defendants, Willett and Forbes, were necessary parties to the suit, but that he would hear counsel upon the question whether, notwithstanding that might be the case, the injunction might not be granted; that he had not made up his mind whether the motion might not prejudice the parties pointed at by the demurrer; that, supposing it to be clear that there was a case for the injunction, and that the injunction would operate for the benefit of the parties not before the court, he was far from thinking that the

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court would, on account of the absence of those parties, hesitate to do what it could for them

1823: *June 12th, 18th, 28th, and November 20th*.—The motion then proceeded. It was twice argued by Mr. *Hart*, Mr. *Wetherell*, and Mr. *Rawlins*, for the plaintiff; and Mr. *Heald*, Mr. *Shadwell*, Mr. *James* and Mr. *Twiss* for the defendants.

After the first argument, the Lord Chancellor again expressed his opinion that the wives of the defendants, Willett and Forbes, were necessary parties to the suit, but, with respect to the other ground of demurrer, he said that the bill had so stated the plaintiff's executorship, *without stating for what [*515] persons he was to be trustee, that he could not consider him to have assented to an interest in the *cestuis que trust*, and divested himself of the interest; and, adverting to the argument that the pendency of the demurrers prevented the motion from being made, his Lordship said that he could conceive many cases requiring immediate interposition where application might be made to the court, notwithstanding the absence of some of the parties, and that it was upon that conception he had permitted the motion to be made.(a)

In support of the motion, it was contended on the part of the plaintiff that he had been ousted by the defendants from all the rights, which, as a proprietor of the theatre, he was entitled to exercise, that the agreement of 1822 utterly destroyed the equal right of interference which ought to have existed in all the proprietors, and was framed for the express purpose of destroying that right, and vesting in the lessees the entire dominion over the theatre; that every provision in that agreement tended to exclude the plaintiff's interference, and was in direct contraven-

(a) It does not appear that any order allowing the demurrers was ever drawn up, or that the necessary parties were brought before the court until after the motion was disposed of: on the 9th of March, 1824, the plaintiff obtained an order to amend, on payment of 20s. costs in respect of the amendments, and of 10l. the costs of setting down the demurrers. Reg. Lib. A., 1823.

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tion of his rights; that the dismissal of Brandon from the office of treasurer, and the non-delivery to the plaintiff of the daily accounts, were parts of the same system; that the plaintiff had a clear right to be furnished with those daily accounts, and that the practice which had existed of their being delivered to the proprietors must be adhered to, or, at all events, that the defendants were not justified in discontinuing that practice without communicating with the plaintiff; that all the parties [*516] were bound by the provisions of the deed *of 1812, and that the defendants could not be permitted to destroy those provisions by the agreement of 1822; that no person, succeeding to a share in the partnership, could exempt himself from the obligation of performing the engagements which attached upon the partner to whom he succeeded, under the plea that he was ignorant of such engagements; and that the alleged ignorance, on the part of the lessees, of the deed of 1812 did not, therefore, affect the case.

On the part of the defendants, it was insisted that, as the bill did not pray that the concern might be wound up, the motion could not be granted consistently with the decided cases; *Waters v. Taylor*,^(a) *Forman v. Homfray*,^(b) *Goodman v. Whitcomb*,^(c) *Marshall v. Colman*.^(d) That the acquiescence of the plaintiff amounted to a consent on his part, to the abandonment of the provisions of the deed of 1812, and a substitution of the arrangement made by the agreement of 1822, and was, of itself, sufficient to prevent the summary interference of the court. That the plaintiff, having renounced the character of a partner, could not call upon the court for protection against his co-partners, and that the agreement of 1822 was operative only between the parties to it, and did not at all affect the plaintiff. The non-delivery of the daily accounts was justified under the circumstances appearing by the affidavits; and it was urged that it was the plaintiff's duty to attend at the theatre and inspect the accounts.

(a) 15 Ves. 10.

(b) 2 V. & B. 329.

(c) 1 Jac. & Walk. 589.

(d) 2 Jac. & Walk. 266.

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In reply, it was said that the plaintiff had only abstained from applying to the court so long as he had been furnished with the daily accounts, from which he could judge of the state of the concern; and that, after the *agreement of 1822, [*517] any attempt at interference, on the part of the plaintiff, would have been wholly useless.

The following observations fell from the Lord Chancellor, in the course of the argument, and on several occasions when the case was mentioned :—

That the court would never take any partnership concern into its own hands by a receiver, and much less by a manager, unless the suit was so framed, as that a decree could be made at the hearing, either that the concern should be carried on according to the terms of some instrument, which, by the agreement between the parties, was to regulate the mode of its being carried on, or that it should be wholly put an end to: that articles, which had been agreed on to regulate a partnership, could not be altered without the consent of all the partners; but that, if alterations were made by some of the partners, and acquiesced in by all, the court would hold that to be an adoption of new terms: that it must be considered, whether the plaintiff had not conceived himself at liberty to withhold more of his personal attention from the concern than he could withhold, entitling himself to call upon the other partners to do their duty: that, where a person, interested as the plaintiff was, proposed to do every part of his duty to the other parties interested, the court would compel those other parties to do their duty towards him, but that, if he chose to discharge his duty towards those other parties in a more limited way, the question would be, whether that circumstance did not destroy his right to call upon them to do their duty towards him? With respect to sending the daily accounts, his Lordship said that he did not find it stipulated for in any of the instruments; that it was a practice which seemed to have prevailed for a great length of time; but that it was not

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[*518] provided for by *covenant; that where there were no stipulations, no covenants, with respect to a particular practice, it followed of necessity, that the majority of partners must decide whether that practice should be continued or discontinued; and that if the minority had a proper opportunity given them of considering the matter, their negative would be of no avail: that there could be no doubt about the general annual accounts, as they were matter of express declaration in the original deed: that, in cases where a majority could bind the minority, if some of the partners were to agree, that they would, by a majority, bind the others: that, let one of them say what he would with respect to the interests of the partnership, they would overrule him, the court would compel them to rescind that agreement, and say, that was a length to which they should not go; the court would not allow the rules applying to partnership concerns to be broken in upon by an agreement of that sort: that, supposing the plaintiff had a right to have the daily accounts delivered to him, it did not follow that the court would interfere; that the court was not bound to interfere upon every breach of adherence to the rules of a partnership concern.

The LORD CHANCELLOR went through the facts of the case, and in so doing, observed that the concern was in the nature of a partnership: that, according to the principles of the court, it would not interfere, on interlocutory motion, to regulate the concerns of any partnership, unless the objects of the bill were such as would probably be carried into execution, when the cause came on to a hearing: that it was not the business of the court to manage or carry on, from time to time, a partnership of any kind, and that it was impracticable for the court to do so;

[*519] *that a bill might be filed for the purpose of compelling partners to do certain things, according to the provisions of certain instruments, and that the court would interfere for that purpose, and that when it did so interfere, it would take care that the decree, to be made at the hearing of the cause, should not be defeated by anything done in the meantime; but that a bill, merely seeking the interposition of the court to carry on a

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partnership, could not be maintained: that, supposing nothing more to have taken place than that the deed of 1812 having been executed, Thomas Harris had, with the consent of all the parties, taken the entire management of the theatre, and Henry Harris, with the same consent, had succeeded to the same species of management, and that disputes having then arisen in consequence of the introduction of new partners, the bill had been filed, the court must have taken upon itself the management; and that, if there had been nothing beyond what he had stated, except a simple demise by Henry Harris to the other parties, it would have been impossible for the lessees to stand in any other situation than the person by whom the demise was made, clothed with all the rights, and subject to all the duties and obligations, created by the deed of 1812; that it would have been nothing more in effect than a substitution of the new parties as partners for ten years; that, unless the terms of the deed of 1812 were varied, by the consent of all the parties bound by its obligations, and entitled to its benefits, the new partners would be entitled to all the rights, and subject to all the obligations contained in that deed: with respect to the delivery of the daily accounts, his Lordship observed that he thought it was competent to the proprietors of the theatre, meeting together, and deliberating upon the subject, to determine that such accounts should not be sent; that the delivery of these accounts could not be stopped, without all the *partners being consulted; but that, if [*520] all had been consulted, the practice had been properly discontinued. In commenting upon the agreement of 1822, his Lordship said, with reference to the covenants applying to the entirety of the premises, that, there being seven-eighths of the whole property vested in the lessees, and they standing for ten years in Harris' place, it was not improper on his part to require such covenants, leaving the lessees to deal with their partners as they could; but, referring to the clauses as to debts which were to be considered as due from the proprietors, though incurred by the parties to the agreement only, and particularly to the clause as to the printing-press, his Lordship said that the debts might properly be considered as debts due from the proprietors, inclu-

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ding the plaintiff, provided they were debts which ought to be thrown upon the proprietors, and were incurred after a proper communication with the plaintiff as to the propriety of their being incurred; but that, *prima facie*, the plaintiff had an undoubted right to be consulted on that proposition; and that, as to the printing press, the plaintiff had a right to be consulted upon the question, whether any should be set up; and that no debt in respect of it could ever be thrown on the general body of the proprietors, unless a decision in favor of its being set up, was come to on the proper principle on which all points, for the consideration of all the partners, were to be considered and decided upon; and he said, that, taking the whole instrument together, it was an instrument, with respect to which, as to many parts of it, it was extremely difficult to say that the partners of the seven-eighths could enter into it, without consulting the partner of the other eighth, but, that the instrument seemed to him to go to the utter destruction of the deed of 1812; that it provided, in many instances, for an application of the funds, different from the application directed by that deed, by which [*521] the *application of the rents and profits, including those taken by Mr. Harris under the instrument in question, was irrevocably fixed; and that, therefore, if the question had arisen immediately after the execution of the instrument, whether it could be carried into execution, consistently with the deed of 1812, the instrument could never have been permitted by the court to overrule the deed, unless upon some other ground, than that the parties to the instrument were ignorant of the deed; that, if the instrument was entered into in entire ignorance of the deed of 1812, it might be good ground for the lessees to say to Harris that he should not hold them to the agreement, as he had not informed them of the nature of the property, or of the obligations to which he was subject by the deed of 1812; but that it never could be said, that without the consent of all parties, the execution of the agreement could, upon the mere ground of ignorance, entirely destroy the obligations contracted by the deed of 1812; that the parties claiming under the agreement could take nothing more than Mr. Harris could give them; and

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that they therefore took, subject to all that Mr. Harris would have been subject to had the agreement not been made: that a party, taking the interest of a partner in a concern, could not be let loose from the obligations the partner was under to the concern; and that, if he chose to ask no questions, he must take at his own risk with respect to those obligations. In noticing the fact that arrangements had been made, and time given, for such of the debts secured by the deed of 1812 as remained unpaid, his Lordship said that that would not do; that without the consent of all the parties, other securities could not be substituted for that which was the primary security.

His Lordship then proceeded to the consideration of the case as it stood in 1812, and as it was affected by what had subsequently happened.

*I have never seen a deed which more irrevocably [*522] fixed upon the parties whose interests were to be bound, the trusts created by it, than the deed of the 9th of March, 1812; it expressly directs, that the funds shall be exclusively applied to the particular purposes there pointed out, and that the treasurer shall be irrevocably directed so to apply the funds: at the same time great difficulties might have arisen upon that deed, from its not providing who should be the manager of the theatre: suppose a manager to have been appointed by some of the persons concerned in the theatre without duly consulting the others, it would have been a much shorter way than filing a bill in equity, to have stated to that manager that he had no right to manage, and to have stated to the treasurer that he acted at his peril in applying any of the funds according to the orders of the manager; the same difficulty would then have presented itself as occurred in the case of the Opera House, that, when the treasurer came to pay the performers, a question would have arisen, whether the person who had made the bargain with them had any authority to make it: so, in the present state of things, a question may arise, whether, if the present management is a management which has not been properly created originally or

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properly sanctioned subsequently, Mr. Robertson will be justified in executing the very first trust of this deed, unless it can be shown that the contracts with the performers are contracts which bind all the persons interested: however that may be, there can be no doubt whatever, that after the execution of the deed of 1812, unless the trusts of it were altered by some effectual means, it never could be competent to any of the proprietors of the theatre, without the consent of the others, to authorize Brandon, whilst he acted under the deed, to apply any part of the moneys coming to his hands, to any other purposes than [*523] those expressed in the deed: considering *the deed to have been an effectual deed, it has been the duty of the treasurer for the time being to say, that, without the consent of all the parties interested, he could not allow any part of the moneys coming to his hands, to be applied otherwise than according to the trusts of the deed: if all the parties interested, except one, came to him and said he should not apply the moneys in the manner directed by the deed, he was authorized to say that he should make that application of the moneys, and that he could make no other application of them: thus the case stood in 1812.

In ordinary partnerships nothing is more clear than this, that although partners enter into a written agreement, stating the terms upon which the joint concern is to be carried on, yet, if there be a long course of dealings, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct. For instance, if in a common partnership the parties agree that no one of them shall draw or accept a bill of exchange in his own name without the concurrence of all the others, yet, if they afterwards slide into a habit of permitting one of them to draw or accept bills, without the concurrence of the others, this court will hold that they have varied the terms of the original agreement in that respect; so, in this case, if it can be shown that in the administration of this property, the proprietors in general, after 1812, pursued a differ

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ent course from that provided for by the deed of March, 1812, they must be taken to have altered the agreement, and to have substituted the terms, to which, in their conduct, they have adhered, instead of the terms contained in the original agreement; and, with respect to the present plaintiff, there can be no doubt, that if, after the deed of 1812 was executed, his testatrix *gave in to a course of administration of the prop- [*524] erty, different from the course provided for by the deed, if her acts, or the acts of others with her consent, afforded such evidence of departure from the terms of the written agreement, as to amount to the substitution of a new agreement, though evidenced only by parol instead of the written agreement, he, claiming under her, must be bound by her acts, and cannot be at liberty to revert back from those acts, establishing a new agreement, to call into operation again the old agreement, and to insist that the non-execution of the old agreement is, in such circumstances, a breach of trust. So again, it is a principle of this court with respect to partnership concerns, that a partner who complains that the other partners do not do their duty towards him, must be ready at all times and offer himself to do his duty towards them.

Whether the observation I am about to make applies to this case at present or not, it may be useful for the guidance of these parties hereafter: it is not enough for the parties who have executed the deed of 1822 to say, we, the owners of seven-eighths, will meet, and Mr. Const may come if he pleases: where there is any material change to be made, which is to be a binding change, notice must be given to all parties of what that change is, and at what time it is to be taken into consideration: for instance, if notice was given with respect to dismissing Mr. Brandon, I am not of opinion, supposing the deed of 1812 to have been an operative deed when Mr. Brandon was dismissed, that it was not competent to the parties to dismiss him, duly taking into consideration whether he ought to be dismissed or not, and duly providing a substitute who should be constituted and bound to all the duties Mr. Brandon was constituted and bound to, and

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whose discharge of those duties should be as well secured as Mr. Brandon's discharge of those duties was secured; but I [*525] say, that, supposing the deed of 1812 *to have been then operative, the proprietary could not dismiss Mr. Brandon without consulting all their partners: if the deed of 1812 was then operative, his dismissal ought to have been the act of all the partners; and I call that the act of all, which is the act of the majority, provided all are consulted, and the majority are acting *bona fide*, meeting not for the purpose of negativing what any one may have to offer, but for the purpose of negativing what, when they are met together, they may, after due consideration, think proper to negative: for a majority of partners to say: we do not care what one partner may say, we, being the majority, will do what we please, is, I apprehend, what this court will not allow. So, again, with respect to making Mr. Robertson the treasurer, Mr. Const had a right to be consulted; his opinion might be overruled, and honestly overruled, but he ought to have had the question put to him and discussed: in all partnerships, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other: they are to act upon the joint opinion of all, and the discretion and judgment of any one cannot be excluded: what weight is to be given to it is another question: the most prominent point on which the court acts in appointing a receiver of a partnership concern, is the circumstance of one partner having taken upon himself the power to exclude another partner from as full a share in the management of the partnership as he, who assumes that power, himself enjoys.

Then, what are the circumstances upon which the lessees of the seven-eighths rely, as having varied prior to the deed of 1822, and to what extent, and in what particulars, the deed of 1812? With respect to what they state, as to their not having known of the deed of 1812, for the reasons I have already given, [*526] I can pay no *attention to that: what they were bound by law to know they must be taken to have known: their obligation in law to know of the deed of 1812, cannot be

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altered by their not having in fact known of it; but, whether they knew of it or not, they cannot take under Harris upon better terms, than those upon which Harris himself took.

I am willing, however, to agree, that usage may be taken as varying the terms of the deed of 1812; usage, which cannot of course be of long continuance, but for this purpose may be of great effect: I am also willing to agree, that the deed of 1812, saying nothing about the appointment of a manager, it must be understood, that managers were thenceforth to be appointed in the same way as they had before been appointed; and that if, for instance, the appointment of Mr. Henry Harris took place without any form whatever, the other parties merely standing by, and seeing him the manager from year to year, in which case I should say, that their non-opposition was their accession to the appointment, a manager now appointed in the same manner, and where there was the same accession to the appointment, would be a perfectly good manager; but, supposing there to have been a manager to be appointed under the deed of 1822, and the lessees of the seven-eighths to have appointed the manager, without consulting the parties interested in the one-eighth, and the question then to have arisen, whether the manager so appointed was properly appointed, on these naked facts, taking the question to have arisen immediately after the execution of the deed of 1822, I should have said that the appointment would not do, there having been no subsequent acquiescence, removing the objection of the parties interested in the one-eighth not having been consulted; that the lessees of the seven-eighths could not, without consulting the *parties interested in the [*527] one-eighth, take upon themselves, merely because they were lessees of seven-eighths, to do those acts which could only be done by the body, or by a majority of the body representing the whole of the body, and that the majority of the body never represented the whole of the body, except where there had been a voice called for from the minority, and submitted to and fairly overruled by the majority, which the court would generally take

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it to be where it had been overruled: now all this applies equally to the appointment of Mr. Robertson.

His Lordship then, after adverting to the situation in which Mr. Robertson stood, in respect of the questions—how far he was duly appointed and duly authorized, in any manner to receive or apply the funds of the theatre, and in what application of those funds he would be safe, and particularly noticing that he could not think Mr. Robertson would be safe in paying to Mr. Harris the 1,360*l. per annum*—proceeded to observe that he could not find that there had been that sort of acquiescence by the plaintiff, which precluded objection on his part; that, unless the deed of 1812 could be argued to give Mr. Brandon a freehold for life in the office of treasurer, it was competent to the parties, acting towards each other as they ought to act, to dismiss Mr. Brandon, and to appoint another treasurer, and that the deed itself, speaking of the treasurer for the time being, raised that implication; but that, if the parties were to be considered as acting under the deed of 1812, they could not act under that deed, in the appointment of a treasurer, without calling the whole of the proprietors together, and taking into consideration who that treasurer should be; that, unless something further could be stated, to oust the reasoning as to the non-accession [*528] of the plaintiff to the *new state of things under the deed of 1822, and, unless the deed of 1822 was to be taken to be the leading deed, and to have excluded the plaintiff from all interference whatever, he could not get rid of the opinion that Mr. Robertson could not be considered as treasurer, and that all the parties were to be considered as partners, having a demand upon each other for that intercourse, which the court enforces between partners; that if the conclusion was that Mr. Robertson was not the treasurer, and that the deed of 1812 could not be displaced, the court must appoint a treasurer, unless the parties would appoint one, according to the true intent and meaning of what must regulate their partnership; but that, as there had been a miscarriage in the appointment of a treasurer, by the judgment of a person having been excluded, whose judg-

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ment ought to have been taken, the most advisable thing to be done, considering the nature of the concern, was for a meeting of the partners to be called to appoint a treasurer.

His Lordship accordingly desired, that a meeting of the partners should be called to appoint a treasurer, and that the court should be informed of what passed at that meeting; and, observing that if what then passed was not satisfactory the court must appoint a treasurer, his Lordship ordered, that in the meantime there should be no application of the income of the theatre, contrary to the deed of 1812.

February 19th.—The matter was again mentioned, and it was stated that no arrangement had been made, and that Mr. Harris had declined to attend any meeting, considering that, having demised his share, he had no interest in the question, and was bound to accede to whatever the lessees agreed upon among themselves; but the Lord Chancellor asked, whether Mr. Harris, having made a lease *of his interest without the [*529] consent of one of his partners, might not apply for an injunction, to restrain his lessees from doing any act prejudicial to that partner. His Lordship then referred it to the Master to appoint a receiver.

Reg. Lib. A. 1823, 657.

APPENDIX.

FILLINGHAM v. BROMLEY.

1823: 6th and 11th March.

Devise of several estates to A. for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of A. in tail male, with divers remainders over, with power, to the persons from time to time entitled to the estates devised, to lease all such estates, except an estate called Juts; and with a direction, that the persons who should be entitled to and possessed of the devised estates, should not lease the estate called Juts, or any part thereof, and that every such person should live and reside on the said estate called Juts; and for default thereof, all the devised estates to go over to the person next in succession, as if the person refusing or neglecting to reside or live at Juts was actually dead.

Held, in a suit by parties making title under a recovery suffered by A. and his eldest son, against a purchaser, for specific performance, that it was too uncertain what the testator meant by the words live and reside, for the court to determine that there had been a forfeiture, and a specific performance decreed.

THIS suit was instituted for the specific performance of an agreement entered into by the defendant for the purchase of some property, formerly part of an estate called Juts, in the parish of St. Stephen, in the county of Cornwall.

The plaintiff's title to the property in question was deduced in the following manner: Pendock Neale, by his will dated the 18th of November, 1768, gave and devised the said estate, called Juts, together with divers freehold estates, situate in the county of Nottingham, subject to certain rent charges, to his nephew, Pendock Neale, for life, and after the determination of that estate by forfeiture or otherwise in his lifetime, to trustees and their heirs during the life of the said Pendock Neale, upon the usual trusts for preserving contingent remainders, and to permit the said Pendock Neale to receive the rents during his life, and after his decease, to the first and other sons of the said Pendock Neale, severally and successively, in tail male, with remainder to the brothers of the said *Pendock Neale, severally and successively, in tail male, with divers remain- [*531]

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ders over; and he willed and directed that it should be lawful for all and every person and persons who, by virtue of any of the limitations thereinbefore contained, should, from time to time, be entitled to the lands and hereditaments thereinbefore devised, if of full age, but if not, for their respective guardians to demise or lease, in possession, the said premises, or any part thereof, for any term not exceeding twenty-one years, at the best rent that could be reasonably obtained for the same (except his aforesaid estate called Juts), it being his will, and he did thereby direct, that such person or persons, who should be entitled to and possessed of the said lands and hereditaments, should not set, let or lease out the said estate called Juts, or any part thereof, and that every such person or persons should live and reside on the said estate called Juts, and for default thereof, he gave and devised all his said lands and hereditaments to such person, who should be the next entitled to the possession of the same, by virtue of any devise or limitation in the said will, as if such person, so refusing or neglecting to reside or live at Juts aforesaid, had been actually dead, anything in his said will contained to the contrary notwithstanding. Pendock Neale, the testator, died in 1772, leaving Pendock Neale, the devisee, an infant. Pendock Neale, the devisee, attained twenty-one on the 27th of August, 1778, and he afterwards married, and had issue Pendock Barry Neale, his eldest son, who was born on the 6th of May, 1783. In Trinity Term, 1804, Pendock Neale and Pendock Barry Neale suffered a recovery of the property in question, and they afterwards sold and conveyed it to the plaintiff; the grantors in the deed for making the tenant to the præcipe, upon the recovery being suffered, were Pendock Neale and Pendock Barry Neale.

[*532] *By the decree made upon the hearing of the cause, on the 7th of March, 1816, it was referred to the Master to inquire whether the plaintiff could make a good title to the premises comprised in the agreement; and, on the 8th of June, 1818, the Master reported in favor of the title.

The defendant excepted to the report, and on the hearing of

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the cause upon the exception and for further directions, on the 16th of July, 1818, it was referred back to the Master to inquire whether, previous to the recovery being suffered in Trinity Term, 1804, there had or had not been a forfeiture or forfeitures of the estate and premises in question, by not complying with the terms of the will of the testator, Pendock Neale. And it was ordered that the Master should state the evidence upon which his conclusion was founded, and that the exception should stand over in the meantime.

On the 17th of February, 1819, the Master made his further report, stating that upon consideration of the will of the testator, and of the evidence laid before him respecting the residence of the said Pendock Neale, the devisee, upon the said estate called Juts, he found that previous to the recovery being suffered in Trinity Term, 1804, there had not been any forfeiture of the estate and premises in question, by not complying with the terms of the said testator's will; and, in a schedule to his report, he set forth the evidence upon which he had come to such conclusion. By the evidence contained in the schedule to the report, it appeared that, for about two years next after he attained twenty-one, Pendock Neale, the devisee, was living and residing, and described himself as living and residing at Juts; that he then went into Nottinghamshire, where he remained for about a year, when he returned to Juts with his wife, whom he married in the interval, and that whilst he was *absent [*533] from Juts upon that occasion, his servants were there upon board wages; that after he had returned to Juts with his wife, he continued to live and reside, and describe himself as living and residing there, for about another year, when, for the purpose of his wife's confinement, he again went into Nottinghamshire, where Pendock Barry Neale was born; and that from the time of his quitting Juts on the last-mentioned occasion, he discontinued to live and reside, or to describe himself as living and residing there, except that he was in the habit of coming there occasionally for a few weeks or months, sometimes with, and sometimes without his family and establishment; it appeared,

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however, that he had at all times two or three servants at Juts on board wages, and that he was assessed to the poor rates as the occupier of Juts, from 1778 to 1790, and for some years subsequent thereto; there was no evidence as to the residence of Pendock Neale, the devisee, from the death of the testator until he attained twenty-one, except that one witness deposed that she used to see him in the neighborhood of Juts, and understood that he was residing there with his mother.

The defendant took another exception to the Master's further report, insisting that the Master ought to have found, that previous to the recovery being suffered, there had been a forfeiture or forfeitures of the estate and premises in question, by not complying with the terms of the testator's will. On the 11th of March, 1819, the cause was heard before the Vice-Chancellor, on the two exceptions, and for further directions, when his Honor ordered that both the exceptions should be overruled, and declared that the agreement ought to be specifically performed, and decreed accordingly.

From this order, the defendant appealed to the Lord Chancellor, and the cause now came on upon the appeal.

[*534] **Mr. Heald* and *Mr. Pepys*, for the appellant:—The objection to the title is, that before the recovery was suffered, there was a forfeiture by non-compliance with the terms of the testator's will, and that in consequence of the forfeiture, Pendock Neale the devisee, and Pendock Barry Neale could not legally suffer the recovery: the evidence makes out, that Pendock Neale did not live and reside at Juts, according to the plain meaning of the testator.

THE LORD CHANCELLOR:—What construction do you put upon the words live and reside?

For the appellant: The testator meant that Juts should be the principal residence of the parties entitled to his estates: it is

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difficult to say, that the true construction of the will is, that they were never to reside there at all: the evidence shows, that in 1782, Pendock Neale discontinued residing at Juts: from that time he held the estate for profit, not for residence.

THE LORD CHANCELLOR:—Suppose he had been a member of Parliament, and had had a house in London, would you have said that he did not live and reside at Juts? Assuming that there was a forfeiture by the father, there was the son to make the tenant to the præcipe.

For the appellant: It is in evidence that the father left Juts, for the purpose of residing elsewhere, before the birth of the son, and the forfeiture must be held to have taken place, on the *day of his leaving Juts for that purpose: the estate [*535] then went over to the person, who at that time, was next in remainder, and the consequence is, that the recovery was bad, there not having been proper parties to it.

The LORD CHANCELLOR then adverted to the estate of the trustees, to preserve contingent remainders, but he subsequently observed, that supposing such estate to have taken place, the father would have had only an equitable estate for life, and the son having the legal estate tail, they could not suffer a recovery.

For the appellant: If the question admits of doubt, is the purchaser to be left to fight it with persons who may claim under the will?

Mr. *Hart*, Mr. *Wetherell*, Mr. *Shadwell* and Mr. *Willis*, for the respondent:—A question of forfeiture is one *strictissimi juris*: it must be made out most clearly that there has been a breach of the directions contained in the will: there is no precise definition as to what is or is not residence: looking at the context of this will, the intention was merely to prevent the mansion house being let: the devisee has fulfilled the condition by not letting the estate.

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THE LORD CHANCELLOR:—That will not do, because, if the devisee had let any part of the estate, there would have been no forfeiture; the lease would have been void after his death, but, by itself, the lease would not have worked a forfeiture.

[*536] *For the respondent: The occupation of a house is sufficient to satisfy a condition to live and reside in it: supposing there was a forfeiture, the son took the benefit of it, and he afterwards joined in the recovery.

THE LORD CHANCELLOR:—There is great difficulty in saying that a forfeiture was incurred, when the court cannot see clearly what it was the testator meant. I cannot agree to the construction of this will which has been contended for, that the testator meant merely to prevent the letting of the estate; there are two things which he clearly meant to prevent, one the letting, the other the non-living and residing. Then comes the question, what is living and residing: occupation is not living and residing: there are many purposes for which the word inhabitant has been taken to include persons as inhabitants of places in which they never were. The question comes to this, what it was the testator meant, and whether, unless a clear meaning can be put upon the will, the court is to take upon itself to say that there has been a forfeiture.

March 11th.—The LORD CHANCELLOR said, that he was of opinion the title was good.

The decree was affirmed.

1823.—In the Matter of Elizabeth Wykeham.

*IN THE MATTER OF ELIZABETH WYKEHAM. [*537]

1823: 5th August.

Where a lunatic had been taken out of the jurisdiction, before the commission issued, an order was made that she should be brought back to England.

UNDER the commission in this matter, which was issued on the 24th of September, 1822, the said Elizabeth Wykeham was found to be of unsound mind, and to have been in the same state from the 1st of August, 1819.

A petition was now presented by the committee, stating that in the month of July, 1822, John Heaver and Elizabeth his wife, with whom the lunatic (who was the mother of Elizabeth Heaver) was then residing at Brighton, removed her from that place to Calais, for the purpose of avoiding any order that might be made in the matter, and of preventing the due execution of the commission; and that, upon the issuing of the commission, directions had been given for the lunatic's being brought back to England, but that, notwithstanding such directions, Heaver and wife detained the lunatic at Calais, under pretence that she could not be removed to England without endangering her life: the petition alleged that this pretence was unfounded, and imputed improper motives to Heaver and wife in keeping the lunatic out of the jurisdiction, and it prayed that directions might be given for her being brought back to England.

The allegations of the petition were supported by affidavits; and a counter-affidavit was filed on the part of Heaver and wife, stating that the incapacity of the lunatic arose from a paralytic affection, and that she retained her faculties, and was capable of understanding *what passed; that she was [*538] residing at Calais according to her own wish and desire, and not under any coercion, and that she had every comfort and protection necessary to her infirmities; that she had expressed a disinclination to return to England, and that remov-

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ing her from Calais, contrary to her wishes, might produce dangerous consequences.

Upon the hearing of the petition, the following order was made by the Lord Chancellor:—"I do think fit, and hereby order, that it be referred to the sitting Master during the vacation, to appoint a proper person, at the expense of the said Elizabeth Wykeham's estate, to repair to the place where the said Elizabeth Wykeham now is; and in case such person shall be satisfied, upon such deliberate inquiry as he may think proper to make, that the said Elizabeth Wykeham may be brought to England, without danger or injury to her health, I do hereby further order, that the said Elizabeth Wykeham be delivered by John Heaver and Elizabeth his wife to the person so to be appointed, in order to her being brought to England, unless the said John Heaver and Elizabeth his wife do, upon the request of such person, forthwith bring the said Elizabeth Wykeham to England: and in case, after service of my order on John Heaver and Elizabeth his wife, the same shall not be complied with, I do hereby further order, that notice of such non-compliance be communicated to the said Master, by the person so to be appointed as aforesaid: and in case he shall be of opinion, that the said Elizabeth Wykeham cannot safely be brought to England, let due notice thereof be also communicated to the said Master."

The Attorney-General for the petition.

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PRINCIPAL MATTERS.

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2. If an agent does not render his accounts within a reasonable time, he must bear the costs of a suit instituted to have the accounts taken; and it will not be any excuse for him, that he offered to pay on account a gross sum, which, it turns out, would have covered all that was due from him. *Collyer v. Dudley*, 421

3. Where a decree ordered, that, in taking the accounts of a mortgagee in possession, annual rests should be made, and that the rents and profits of the premises, as often as they exceeded the interest accrued due on the debt, should be applied in reduction of the principal; a rest ought to be made at the date of the receipt by the mortgagee of a sum exceeding the interest, though occurring in the interval between the annual rests. *Binnington v. Harwood*, 477

ACCUMULATION.

1. The plaintiff's father, upon the marriage of his daughters, demises an estate to trustees upon trusts for raising certain sums, which are settled upon the daughters and their children; and by his will, after charging the estate with other sums to be settled upon the same trusts, with portions for sons, and with a further sum in discharge of a mortgage of another estate, devises it to other trustees, upon trust from time to time to receive the rents and profits, and to invest the same in the purchase of stock, so as to accumulate and form a fund for the payment of the aforesaid charges; "and after the same should have been raised and paid, upon trust to pay the net rents, issues and profits unto or for the benefit of such person of his own name, blood and family, as for the time being should succeed to and be invested with his title and dignity of a baronet, to the end that his said estate might be continued in his name, blood and family, and be enjoyed and go along with his title, so long as the rules of law and equity would permit; but if upon failure of issue male of his body there should not be any person who should be entitled to enjoy his title, upon trust to stand seised of the estate, for the benefit of the person or persons who should be his right heir or heirs at law, and to convey and assure the same accordingly;" held that the trust for accumulation was good, and that the plaintiff, the succeeding baronet, took a vested estate for life. *Bacon v. Proctor*, 31

and 10 W. 3, is altogether transferred to the court of which the submission is made a rule; and awards of that nature must be regulated by the statute with respect to the period within which application must be made to set them aside. A case of fraud does not constitute an exception. *Auriol v. Smith*, 126

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3. A. and B. entered into a joint and several bond for securing a sum of money advanced to A. by his bankers. After the execution of the bond, and before it became due, A. paid money to the bankers and he continued to draw upon them until his banking account was overdrawn. Some years afterwards an account was settled between A. and the bankers in which the whole money secured by the bond was treated as remaining due from A. The bankers then took a warrant of attorney from A. for securing payment of the balance found due upon the settlement by instalments at distant periods. Several of the instalments were paid, but A. became bankrupt before the whole debt was liquidated. It being proved that B. was privy to the settlement of accounts between A. and the bankers, and to the arrangement respecting the warrant of attorney; held, first that B. was not discharged by the time given to A., and secondly, that the bond was not discharged by the course of payment, the money paid by A. to the bankers being applicable to the banking account, and the bankers being entitled to hold the bond and warrant of attorney as distinct securities.

Upon the occasion of the bond being executed, the title deeds of an estate purchased by A. were deposited with B. as an indemnity against his liability upon the bond; the legal interest in the estate was likewise conveyed to B., and it was agreed that he should also hold it as an indemnity. After the death of B. his executor delivered up the title deeds to A., upon a false representation by him that the bond had been paid off. Held, that a conveyance of the legal estate could not be compelled until the indemnity was worked out, and that the lien upon the title deeds remained. *Tyson v. Cox*, 395

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7. A testator, after giving a legacy in trust for a charitable purpose, says, "As money is of more uncertain value than land, I do also give them (the trustees) power to make such purchase as they shall think best for perpetuating the gift:" Held, that these words do not bring the legacy within the Mortmain Act.

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2. a solicitor's bill having been partly taxed and paid, an order obtained as of course, referring the bill generally for taxation, was discharged with costs.

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The conduct of the solicitor cannot be adduced in support of such an order, and the costs of affidavits upon that subject were ordered to be paid as between solicitor and client. *Clutton v. Pardon*, 301—4

3. The costs of the committee of a lunatic trustee, conveying under the statute, must be paid by the *cestui que trusts*.

The estate being vested in the lunatic upon trustees for securing an annuity, and subject thereto upon trust for the grantor of the annuity, the grantee and the assignees of the grantor of the annuity were ordered to defray equally the committee's costs of an application by them for a reconveyance of the estate. *Ex parte Pearce*, 325

4. Where, in a charity information, the relators are allowed their costs of proceedings which the Attorney-General has attended separately by his own solicitor, without an order of the court for so doing, the Attorney-General will not be allowed his separate costs. *Attorney-General v. Dove*, 328

5. A party who is served with a petition, but has no interest in the order to be made upon it, is not entitled to the costs of appearing on the hearing of that petition. *Garey v. Whittingham*, 405

6. A bill of costs, where the amount of it has been settled between the solicitor and the client, and part of it has been paid and security given for the remainder, will not be ordered to be taxed, merely because it contains charges which would be disallowed on taxation.

Semble, an order obtained as of course for the taxation of a bill of costs, which has been settled and paid, will not be discharged for mere irregularity, without any discussion of the merits, if the petition, seeking to discharge that order, enters into the merits of the case. *Gretton v. Leyburne*, 407

7. If an agent does not render his accounts within a reasonable time, he must bear the costs of a suit instituted to have the accounts taken; and it will not be any excuse for him, that he offered to pay on account a gross sum, which, it turns out, would have covered all that was due from him. *Collyer v. Dudley*, 421

An equity of redemption, being subject to a trust for sale, the mortgage, with some of the *cestuis que trust* of the equity of redemption, filed a bill for the sale of the premises, alleging that the whole of his principal, with an arrear of interest, was due to him, and suppressing the fact, that he had been for several years in possession; the result of the account was, that nothing was due on the mortgage when the bill was filed: Held, that the

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2. A creditor, who makes out a *prima facie* case of misconduct in trustees, is entitled to a decree that they shall account for whatever they might have received without their wilful default or neglect; though, in a prior suit instituted by another creditor and conducted without collusion, a common decree for an account has been previously made against them. *Shepherd v. Towgood*, 397

DEED.

1. Bill to rectify a conveyance, alleged to have passed by mistake more than was included in a previous agreement, dismissed; the conveyance reciting a more extended agreement, the parties being dead, the agent of the grantor having acknowledged the extended agreement, and the agent of the grantee, who could have given a personal account of the transaction, not having been examined by the plaintiff.

A conveyance which passes too much may be rectified, and the excess deducted.

Semble, an issue may be directed with a view to correcting a mistake in a deed. *Beaumont v. Bramley*, 41

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1. An estate being in lease, A. enters and receives the rents during the continuance of the lease, and afterwards continues in possession, up to a period more than twenty years distant from the time of his entry. Within twenty years after the expiration of the lease, B. brings an ejectment, and files a bill for discovery; though the ejectment might be maintained at law, a demurrer to the discovery is good. *Cholmondeley v. Clinton*, 107

2. Where a bill is filed to stay waste, and a demurrer is put in, the court will hear the demurrer immediately. *Const v. Harris*, 514

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in discharge of a mortgage of another estate, devises it to other trustees, upon trust from time to time to receive the rents and profits, and to invest the same in the purchase of stock, so as to accumulate and form a fund for the payment of the aforesaid charges; "and after the same should have been raised and paid, upon trust to pay the net rents, issues and profits unto or for the benefit of such person of his own name, blood and family, as for the time being should succeed to and be invested with his title and dignity of a baronet, to the end that his said estate might be continued in his name, blood and family, and be enjoyed and go along with his title, so long as the rules of law and equity would permit; but if upon failure of issue male of his body there should not be any person who should be entitled to enjoy his title, upon trust to stand seised of the estate, for the benefit of the person or persons who should be his right heir or heirs at law, and to convey and assure the same accordingly;" held that the trust for accumulation was good, and that the plaintiff, the succeeding baronet, took a vested estate for life. *Bacon v. Proctor*, 31

3. Devise to A. and her heirs forever, in the fullest confidence that after her decease she will devise the property to my family; A. is tenant in fee. *Wright v. Atkins*, 143

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4. The court rolls of a manor, taken by themselves, are evidence only against the tenants of the manor, and the lord of the manor. *Attorney-General v. Lord Hotham*, 217

5. Where a sum of money came to the hands of one of two executors, who paid it over to the other executor, it was held that the executor who first received it could not, under the usual decree for an account, examine the other executor as a witness to prove that the money paid over was duly applied on account of the affairs of the testator, and an order obtained for that purpose was discharged. *Dines v. Scott*, 358

6. A person, who admits that he conceives himself bound in honor, though not legally bound, to contribute to the expenses of a party in a suit, is a competent witness for that party. *Parker v. Whitby*, 366

7. Proof of the handwriting of an attesting witness to a will, received under particular circumstances in order to found a decree establishing the will. *James v. Parnell*, 417

EXAMINATION.

1. Personal examination in equity is not analogous to the *viva voce* examination of a witness. *Farquharson v. Balfour*, 198

2. An examination may be quite sufficient, though it is untrue, and inconsistent with what has been sworn by the defendant in his answers.

The principle of this court is, that the plaintiff must be satisfied with what the conscience of the defendant allows him to swear. *Farquharson v. Balfour*, 204

EXECUTOR.

1. Executor taking a contingent reversionary interest under a will, not precluded from giving evidence of the intention that he should have the residue beneficially, nothing upon the face of the will indicating that he was to take the office merely.

Under the effect of the will and the evidence the executor was declared to be entitled beneficially.

Whether the contingent reversionary interest would have had the effect of rendering him a trustee for the next of kin? *Quere. Lynn v. Beaver*, 63

The motives which might influence the testator in favor of the executor are to be considered in determining the question, whether the executor takes the residue beneficially. *Id.* 68

2. Executors may pay legacies, or hand over the residue, within the year after the death of the testator. *Augustin v. Martin*, 241

3. The custom of York does not apply where an executor is appointed. *Wilkinson v. Atkinson*, 257

4. Where a sum of money came to the hands of one of two executors, who paid it over to the other executor, it was held that the executor who first received it could not, under the usual decree for an account, examine the other executor as a witness to prove that the money paid over was duly applied on account of the affairs of the testator, and an order obtained for that purpose was discharged. *Dines v. Scott*, 358

5. A person who is permitted by an executor to possess himself of part of the assets of a testator, and who, after the executor's death, and when there is no legal personal representative either of the testator or of the executor, retains the assets, and acts in the execution of the trusts of the will, is not executor *de son tort* to the original testator. *Tomlin v. Beck*, 438

F

FAMILY ARRANGEMENT.

A father being tenant for life, with remainder to his first and other sons successively in tail male; the eldest son, soon after he attained twenty-one, joined his father in suffering a recovery, an annuity was secured to him during his father's life, and part of the estates were limited to the father in fee, the residue of them were resettled, the son taking back an estate for life, with remainder to his first and other sons in tail general, remainder to his daughters in tail general. The transaction to be considered as a mixed case of bargain and sale, and of family arrangement; and the eldest son having died without issue, a bill filed by his brother, the next remainder-man in tail, who had done confirmatory acts, and accepted interest under the will of his father, to set aside the settlement as obtained by undue influence, was dismissed.

Transactions of this nature between father and child, to be viewed with a reasonable degree of jealousy, not in the light of reversionary bargains.

Whether, after the lapse of twenty years, such a suit could be maintained at all. *Quere.*

Whether a remote remainder-man can complain of a transaction between the tenant for life and the immediate remainder-man, where the immediate remainder-man makes no complaint. *Quere. Tweddell v. Tweddell,* 1

FEME COVERT.

1. A writ of *ne exeat regno* against a feme covert administratrix cannot be sustained. *Pannell v. Tayler,* 96

2. *Feme covert* holding herself out in the character of a feme sole may be arrested, and courts of law will not discharge her upon motion. *Pannell v. Tayler,* 100

FOREIGN GOVERNMENT.

Whether the king's courts will interfere upon the subject of a contract with a country which he does not recognize, or will assist in the recovery of money advanced by the subjects of this country to a colony at war with its parent state, the parent state being at peace with this country. *Jones v. Garcia del Rio,* 299

FORFEITURE.

See COVENANT, 2.
SPECIFIC PERFORMANCE, 7.

FRAUD.

Where a party applies to set aside an award on the ground of newly discovered fraud, he is bound to show that it is a new discovery, and that he could not with due diligence have made the discovery before. *Auriol v. Smith,* 127

FRAUDS (STATUTE OF).

The person entitled to the reversion in fee of a house, expectant upon a term vested in a lessee who has demised the premises for a portion of his term to a sub-lessee, agrees by one letter to grant that sub-lessee an extension of lease at a certain yearly rent, and, in another letter, fixes the time when the term which he thus proposes to grant, is to expire; this is a valid agreement within the Statute of Frauds, and, under it, the sub-lessee has a right to a lease which shall commence from the expiration of the existing term. *Verlander v. Codd,* 352

H

HEIR.

See ESTATE 4,

I

IMPERTINENCE.

1. Upon a bill filed by merchants in England against merchants in India, for an account of the dealings and transactions between them, one of the defendants, residing in England, in answer to an allegation in the bill that some cotton which had been sent by the defendants to the plaintiffs was of inferior quality, said, that he had no personal knowledge of the dealings between the two firms, but that he had received certain affidavits and certificates, which his partners in India had caused to be made by experienced persons there, from which he believed the cotton to be of superior quality, and set forth the affidavits of certificates, in a schedule, *in hæc verba*: held that the schedule was not impertinent. *Parker v. Fairlie,* 368

2. A few unnecessary words in a bill do not render it impertinent.

In a bill for an account, it is not impertinent to set out at length letters sent to the defendant demanding the account, though the bill contains a general allegation that applications have been made to the defendant to account, and the usual charge as to letters in the possession of the defendant. *Del Pont v. De Tusset*, 486

INCUMBRANCES.

In all cases where money is paid off by individuals not having an absolute permanent interest in the premises, the court looks at the intention. *Pitt v. Pitt*, 183

See INTEREST, 1.

INJUNCTION.

Injunction to restrain the breach of a covenant, that buildings shall be erected upon a general plan refused, the covenantee having acquiesced in a partial deviation from the plan, and not having made immediate application to the court.

A landlord who relaxes in favor of some of his tenants a covenant entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing that covenant. *Roper v. Williams*, 18

2. Where a decision which is to bind others, can only be made hereafter, it is the duty of the court, in the meantime, to preserve the property in such a state, that when it is made out who are the objects of favorable decision, they may have the benefit of it.

The court therefore refused to interfere by injunction to restrain A. from cutting down timber, upon a bill filed by persons claiming to be interested under the foregoing devise after the death of A., but ordered that A. should be at liberty to cut the timber, in a husbandlike manner, as tenant in fee, giving security for the value, or bringing the value into court. *Wright v. Alkyns*, 143

3. Motion to stay the execution of a writ of inquiry of damages, not supported by the ordinary affidavit upon a motion to stay trial, refused with costs. *Rodenhurst v. Tudman*, 305

4. Injunction granted to stay proceedings upon a sentence in the Admiralty

Court, new evidence having been discovered at a period, when, according to the practice of that court, it could not be received. *Jarvis v. Chandler*, 319

5. Tenant of a lunatic's estate relieved against an ejectment founded on a forfeiture by breach of covenant to repair. *Ex parte Vaughan*, 434

6. Where there is a case for a special injunction, and the injunction will operate for the benefit of parties not before the court, the absence of those parties, though made the ground of demurrer to the bill, will not prevent the court from interposing. *Const v. Harris*, 512

INTEREST.

1. An infant tenant in tail is bound to keep down the interest of debts charged upon the entailed estates.

A tenant for life was also held to have been liable to keep down the interest of the debts, although, having the ultimate remainder in fee, he had consented to an Act of Parliament, by which the estates were vested in trustees for the payment of the debts. *Burges v. Maubey*, 167

2. The interest of a legacy not expressly disposed of by a will till the persons come into existence who are to take the capital, falls into the residue. *Harris v. Lloyd*, 314

INTERPLEADING.

Upon the hearing of an interpleading bill, evidence is admissible to show that the plaintiff has retained possession of the subject of the suit under an indemnity from some of the defendants. *Slatham v. Hall*, 30

INTERROGATORIES.

See ANSWER, 2.

ISSUE.

1. An issue may be directed with a view to correcting a mistake in a deed. *Beaumont v. Branley*, 41

2. Miscarriage of a judge, in directing a jury, is not a ground for a new trial, if, looking at the whole evidence and the address of the judge to the jury, the con-

science of the court is satisfied. *Head v. upon the petition of a tenant. Ex parte*
Head, 142 *Town,* 137

J

JURISDICTION.

1. Where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing; and does not create any necessity for an appeal. *Attorney-General v. Lord Hotham,* 219

2. Whether the king's courts will interfere upon the subject of a contract with a country which he does not recognize, or will assist in the recovery of money advanced by the subjects of this country to a colony at war with its parent state, the parent state being at peace with this country? *Jones v. Garcia del Rio,* 299

See CHARITY, 3.

TRUST, 4.

K

KING.

See CHARITY, 3.

L

LAND TAX.

Where lands are allotted under an enclosure act in respect of rights of common appurtenant to other lands of which the land tax has been redeemed, the land tax does not attach upon the allotment. *Boehm v. Wood,* 334

LANDLORD AND TENANT.

1. Injunction to restrain the breach of a covenant, that buildings shall be erected upon a general plan refused; the covenantee having acquiesced in a partial deviation from the plan, and not having made immediate application to the court.

A landlord who relaxes in favor of some of his tenants, a covenant entered into for the benefit of all, is not entitled to an injunction to restrain the other tenants from infringing that covenant. *Roper v. Williams,* 18

2. The court will not direct a reference to the Master as to the reduction of rent

LAPSE.

Where a testator, resident and domiciled at the time of his death within the province of York, disposes of all the residue of his personal estate, and names executors, but his disposition fails as to part of the residue, by the death of one of the residuary legatees in his lifetime, the share which thus becomes lapsed, will be apportioned between the widow and the next of kin, according to the Statute of Distributions, and will not be affected by the custom of the province. *Wilkinson v. Atkinson,* 255

LEASE.

Upon an information to set aside a lease for ninety-nine years of charity lands, the defendants, the lessees, set up a title adverse to the lease; upon the merits it was held, that there was no ground for the defence, but the court was of opinion, that if the merits had been otherwise, the defendants were estopped, and could not dispute the title while they retained the possession:

Seemle, the lessees ought not to have been permitted to enter into evidence, upon the principle that the plea of *nil habuit in tenementis* could not have been pleaded at law.

A mere husbandry lease of charity lands for ninety-nine years at an uniform rent cannot be supported. *Attorney-General v. Lord Hotham,* 209

LEGACY DUTY.

A testator directs his executors and trustees to pay certain annuities and legacies, "clear of the property tax, and all expenses attending the same;" the legacy duty ought to be paid by the executors out of the assets of the testator, and the annuitants and legatees are entitled to receive the full amount of their respective legacies and annuities, without any deduction in respect of legacy duty. *Courtney v. Vincent,* 433

LEGITIMACY.

Where personal access between husband and wife is established, sexual intercourse is to be presumed; and the pre-

sumption must stand till rebutted by clear and satisfactory evidence. *Head v. Head*, 138

See CHILDREN 1.

LIEN.

1. A solicitor has no lien upon the will of his client, and cannot refuse to produce a deed executed by the client in his favor, containing a reservation of a life interest, and a power of revocation.

Where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and the defendant cannot resist the production upon the ground of lien.

In a suit instituted against a solicitor, who had also acted in the capacity of steward for an account and for delivery of title deeds, the court upon motion ordered the deeds to be delivered up to the plaintiff, upon payment into court of so much of the balance claimed by the answer as was not covered by any security. *Batch v. Symes*, 87

2. Where deeds are deposited for the purpose of obtaining credit, the person with whom they are deposited has no lien upon them for what is due to him in respect of moneys previously advanced. *Mouniford v. Scott*, 247

3. Where a party has a pressing necessity for papers in the hands of his solicitor, the court will order them to be delivered up upon a deposit being made sufficient to cover the amount of the solicitor's bill and the costs of the taxation. *Clutton v. Pardoe*, 301

4. A solicitor, who has declined to proceed with a cause, will be ordered, though his bills of costs are not paid, to deliver up the papers to the present solicitor of the party, the latter undertaking to hold them subject to the former solicitor's lien, for what shall be found due to him on the taxation of the bills.

An offer on the part of the former solicitor, after the motion is made, to proceed with the cause, will not prevent the court from ordering him to deliver up the papers on the terms mentioned above. *Colegrave v. Manby*, 400

LIMITATIONS (Statute of).

Where real estates are devised in trust for the payment of debts, in aid of the personal estate, the statute of limitations does not run in equity after the death of the testator. *Hughes v. Wynne*, 307

LUNACY.

1. The costs of the committee of a lunatic trustee, conveying under the statute, must be paid by the *cestui que trusts*.

The estate being vested in the lunatic upon trusts for securing an annuity, and subject thereto upon trust for the grantor of the annuity, the grantee and the assignees of the grantor of the annuity were ordered to defray equally the committee's costs of an application by them for a reconveyance of the estate. *Ex parte Pearce*, 325

2. Tenant of a lunatic's estate relieved against an ejectment founded on a forfeiture by breach of covenant to repair. *Ex parte Vaughan*, 434

3. Where a lunatic had been taken out of the jurisdiction before the commission issued, an order was made that she should be brought brought back to England. *In the matter of Elizabeth Wykeham*, 357

M

MAINTENANCE.

Tenant for life is bound to keep down the interest of debts, but being an heir at law not otherwise provided for, is, as against the remainder-man, entitled to maintenance. *Burges v. Maubey*, 174

MISNOMER.

Semble, where the plaintiff is misnamed in an order to dismiss a bill for want of prosecution, in consequence of an error in the six clerks' certificate, a replication filed after service of the order will not be irregular. *Verlander v. Codd*, 94

MISTAKE.

Bill to rectify a conveyance alleged to have passed by mistake more than was included in a previous agreement, dismissed; the conveyance reciting a more extended agreement, the parties being dead, and the agent of the grantee, who could have given a personal account of the transaction, not having been examined by the plaintiff.

A conveyance which passes too much may be rectified, and the excess deducted.

Semble, an issue may be directed with a view to correcting a mistake in a deed. *Beaumont v. Bramley*, 41

MONEY.

Testatrix, by her will, disposes of certain long annuities, and of a sum in cash, and then uses the following words: "I believe there will be sufficient money left to pay my funeral expenses." By a codicil to her will the testatrix expresses herself thus: "If there is money left unemployed I desire it may be given in charity." Held, that the general residue of the testatrix's personal estate, including a sum of 2,500*l.* trust moneys, in which she had a vested reversionary interest, at the time of her death, subject to be divested by the appointment of her mother, passed under the words "money left unemployed," and was well given to charity. *Ommanney v. Butcher*, 265, 266

See WILL, 8.

MORTGAGE.

1. Feme sole makes a mortgage of a leasehold for years, and afterwards marries; the mortgage is then transferred, and the husband joins in the transfer, and covenants to pay the money. During the coverture, the husband, by gradual payments out of his own property reduces the money due upon the mortgage; by his will he makes a disposition of the mortgaged premises, and dies in the lifetime of his wife; upon a bill by the wife, who claimed to be entitled by survivorship to redeem the mortgage, the redemption was decreed upon the terms, that the husband's estate should stand in the place of the mortgagee, for the sums paid by him out of his own property in reduction of the mortgage debt. *Pill v. Pill*, 180

2. Where a bond is given by principal and surety, and at the same time a mortgage is made for securing the debt, the surety, if he pays the bond, has a right to stand in place of the mortgagee. *Copis v. Middleton*, 231

3. An officer in the army cannot pledge or mortgage his commission.

An officer deposited his commission as a security for a loan of money, and further covenanted with the depository B. to sell the commission, and to repay the loan out of the proceeds of the sale; a sale having been effected subsequently, and the regulation price having been paid to the retiring officer's agents, he transmitted to them a written order, directing them to discharge, out of the money in their hands, certain specified

debts due from him to certain specified individuals, which individuals had no notice of his contract with B.: Held, that these creditors were entitled to a priority over B. *Collyer v. Fallon*, 454

After the institution of the suit, the officer took the benefit of the Insolvent Debtors' Act: Held, that B. had not any title, preferable to that of the general body of the insolvent's creditors, to the surplus which remained after the debts specified in the written order were satisfied. *Collyer v. Fallon*, 459

4. Where a decree ordered, that, in taking the accounts of a mortgagee in possession, annual rests should be made, and that the rents and profits of the premises, as often as they exceeded the interest accrued due on the debt, should be applied in reduction of the principal; a rest ought to be made at the date of the receipt by the mortgagee of a sum exceeding the interest, though occurring in the interval between the annual rests.

From that date the subsequent annual rests ought to be computed.

An equity of redemption, being subject to a trust for sale, the mortgagee, with some of the *cestuis que trust* of the equity of redemption, filed a bill for the sale of the premises, alleging that the whole of his principal, with an arrear of interest, was due to him, and suppressing the fact, that he had been for several years in possession; the result of the account was, that nothing was due on the mortgage when the bill was filed: Held, that the mortgagee must pay to the defendants the costs of so much of the suit as related to the mortgage and the accounts and inquiries concerning it. *Binnington v. Harwood*, 477

See ESTATE, 1.

MORTMAIN.

7. A testator, after giving a legacy in trust for a charitable purpose, says, "As money is of more uncertain value than land, I do also give them (the trustees) power to make such purchase as they shall think best for perpetuating the gift." Held, that these words do not bring the legacy within the Mortmain Act. *Attorney General v. Goddard*, 348

N

NE EXEAT REGNO.

A writ of *ne exeat regno* against a feme covert administratrix cannot be sustained. *Pannell v. Taylor*, 96

Where a writ of *ne exeat regno* issues for a larger sum than is due, the court will make an order that so much only shall be raised as is due, without quashing the writ.

Where the writ issues against an executor at the instance of a legatee, it must be marked for the whole amount of what is due, not only to the plaintiff, but to other persons. *Pannell v. Tayler*, 100

2. The writ of *ne exeat regno* does not issue for alimony after a decree in the ecclesiastical court pending an appeal from that decree. *Street v. Street*, 322

The writ of *ne exeat regno* is not granted for interim alimony before a decree. *Street v. Street*, 323

3. In a suit against a purchaser for specific performance, where a receiver had been appointed and was in possession of the estate, and the Master's report in favor of the title, except as to a very small part of the estate for which the purchaser was entitled to an abatement, had been confirmed, and followed by an order, by which, after referring it to the Master to ascertain what abatement the purchaser was entitled to, and to compute interest upon the remainder of the purchase money, and to settle the conveyances, it was ordered, that upon the execution of the conveyances and delivery thereof, and of the title deeds to the purchaser, he should pay to the plaintiffs the remainder of the purchase money, after deducting the abatement, with the interest to be computed by the Master, and that the receiver should thereupon deliver up to him possession of the estate, the court refused to discharge a writ of *ne exeat regno* issued against the purchaser, and marked for the full amount of the purchase money, though the abatement (which it clearly appeared would be less than the interest) had not been ascertained by the Master, and no steps had been taken towards the execution of the conveyances.

The sheriff having taken the defendant under the writ, refused to release him out of custody until the whole sum for which the writ was marked was paid into his hands, and the court did not disapprove of his conduct. *Boehm v. Wood*, 332

Semble, where the writ issues against the purchaser of an estate in a suit for specific performance, the circumstance that he may have property to answer the purchase money is not to be regarded. *Id.* 338

What the sheriff does in the case of a writ of *ne exeat regno*, is upon his own responsibility. *Id.* 340

Upon the defendant's stating that if the plaintiffs obtained a decree he would leave the kingdom, the writ was issued in an early stage of the cause. *Id.* 342

The Master of the Rolls has jurisdiction to direct the writ to issue. *Id.* 343

The debt for which the writ issues must be equitable, must be due, and must be such a debt that the sum to be marked upon the writ can be ascertained.

The case of account an exception to the rule that the debt must be equitable.

The exception founded on the difficulty of proceeding at law in such matters.

In matters of account the party may swear to his belief as to the amount of the balance.

The cases of the writ being issued in suits for specific performance, are also founded on the difficulty of proceeding at law.

The rule that the sum to be marked upon the writ must be ascertained, instanced in the case of executors.

Upon the application for the writ it need not be sworn that the party is going abroad for the purpose of avoiding payment of the debt. *Boehm v. Wood*, 344

N

NEXT OF KIN.

If a testator means to create a trust, and the trust be ineffectually created or fail, the next of kin take. *Ommanney v. Butcher*, 270

See EXECUTOR, 1.
WILL, 8.

NOTICE.

Whether notice to an attorney in one transaction shall be notice to him in another transaction, must in all cases depend upon the circumstances. *Mountford v. Scott*, 280

O.

OPENING BIDDINGS.

See PRACTICE, 1.

P.

PARENT AND CHILD.

1. A father, tenant for life, remainder to his first and other sons successively in tail male; the eldest son soon after he attained twenty-one, joined his father in suffering a recovery; an annuity was secured to him during his father's life; parts of the estates were limited to the father in fee, and the residue of them were resettled, the son taking back an estate for life, with remainder to his first and other sons in tail general, remainder to his daughters in tail general. The transaction is to be considered as a mixed case of bargain and sale, and of family arrangement; and the eldest son having died without issue, a bill filed by his brother, the next remainder-man in tail, who had done confirmatory acts, and accepted interests under the will of his father, to set aside the settlement as obtained by undue influence, was dismissed.

Transactions of this nature between father and child, to be viewed with a reasonable degree of jealousy, not in the light of reversionary bargains.

Whether, after the lapse of twenty years such a suit could be maintained at all? *Quere.*

Whether a remote remainder-man can complain of a transaction between the tenant for life and the immediate remainder-man, where the immediate remainder-man makes no complaint? *Quere.*
Tweddell v. Tweddell, 1

PARTIES.

1. A testatrix gives a legacy in trust for the minister of a chapel, but directs that, upon a specified contingency, the legacy is to go to the trustees of a certain college; the interest is paid during many years to the minister of the chapel: Held, that the charity for the chapel may be established upon a bill and information to which the trustees of the college are not parties. *Attorney-General v. Goddard,* 348

2. Where there is a case for a special injunction, and the injunction will operate for the benefit of parties not before the court, the absence of those parties, though made the ground of demurrer to the bill will not prevent the court from interposing. *Const v. Harris,* 512

3. Where an executor has not assented to a specific bequest, the persons bene-

ficially entitled are not necessary parties to a suit relating to the property specifically bequeathed. *Const v. Harris,* 514

See RECEIVER, 2.

PARTNERSHIP.

1. A testator directs, that W. F. shall, with a capital taken out of his assets, continue his, the testator's business; that he shall bind D. G. apprentice to himself; that he shall take D. G. into partnership at the end of his apprenticeship, or so soon after as he shall think him capable; and that D. G. shall have one-third of the profits of the business: D. G. is not entitled to claim any share of the profits which are made before he is admitted into partnership. *Gordon v. Rutherford,* 375

2. The representative of a deceased partner, the account between him and the partnership being at the time unsettled, agrees with the surviving partners to assign to them all his interest in the concern, upon being paid a certain sum of money, and having an indemnity against all claims upon the partnership; the assignment is executed, the money paid, and a joint covenant of indemnity given by the surviving partners: Held, that the covenant is not to be considered in equity as a joint and several covenant. *Sumner v. Powell,* 423

3. The court will entertain a bill to compel partners to act according to the provisions of instruments into which they have entered, and, where it will interfere for that purpose, will take care that the decree shall not be defeated by anything done in the meantime.

Thus, where in 1812, the then proprietors of Covent Garden Theatre executed a deed, by which they covenanted and agreed that the profits of the theatre should be exclusively appropriated to particular purposes, and that the treasurer for the time being should be irrevocably directed so to apply the profits, and in 1822, parties then entitled, under the former proprietors, to seven-eighths of the theatre entered into an agreement, which provided, in some respects, for a different application of the profits, and otherwise affected the rights of a party interested in the remaining eighth, who was not consulted on the subject, the court, upon a bill filed by that party, for the specific performance of the covenants and agreements contained in the deed of 1812, appointed a receiver. *Const v. Harris,* 496

4. The court will not appoint a receiver, or a manager, of any partnership concern, unless the suit be so framed, as that a decree may be made, either that the concern shall be carried on, according to the terms of an instrument, which, by the agreement of the parties, was to regulate the mode of its being carried on, or, that it shall be wholly put an end to. *Const v. Harris*, 517

5. Partners may be held by their conduct to have changed the terms of a written agreement into which they have entered for carrying on the concern. *Const v. Harris*, 523

6. The act of a majority of partners is the act of all, provided all are consulted, and the majority are acting *bona fide*. *Const v. Harris*, 525

7. The majority of partners never represents the whole body, except where there has been a voice called for from the minority.

The court will generally take the opinion of the minority to have been fairly overruled. *Const v. Harris*, 527

PERPETUITY.

Devise to A. for ninety-nine years, if he should so long live: remainder to his first son, then unborn, for ninety-nine years, if he should so long live; and so on in tail male to such first son lawfully issuing forever; and for want and in default of such issue of such first son, to the second and other sons successively for ninety-nine years, only in case he should so long live; and that such elder son or the issue of such elder son should have no greater estate than for ninety-nine years, determinable at his decease; and if there should be no issue male of A., at the time of his (A.'s) death, or in case there should be such issue male at that time, and they should all die before twenty-one without issue male, then to B. for ninety-nine years, if he should so long live; remainder to the first son of B. for ninety-nine years, if he should so long live, &c.: held, that A. took under the will an estate for ninety-nine years in the freehold estates, determinable with his life and the same estate in the leaseholds, if they should so long continue; and that, upon his death, his first son would take an estate for ninety-nine years in the freehold, determinable with his life, and the remainder of the term in the leaseholds: but that the limitations to the second and

other unborn sons of A. were void, as tending to perpetuity; and the limitations over to B., &c., after these void limitations were not accelerated, but were void also. *Beard v. Westcott*, 25

See ACCUMULATION, 1.

PLEA.

After plea pleaded, and replication filed, and before the plea set down, it is not a motion of course to withdraw the replication, and amend the bill.

An order for that purpose obtained of course, discharged for irregularity, and the amended bill ordered to be taken off the file. *Carlisle v. L'Estrange*, 22

PLEADING.

1. Claiming the residue as executor is sufficient to let in parol evidence in support of the legal title, without alleging a title by the effect of the parol evidence. *Lynn v. Beaver*, 66

2. *Semble*, two persons averring that the title is in one or the other of them, and each contending that it is in himself, cannot join in a suit as co-plaintiffs. *Cholmondeley v. Clinton*, 116

3. Some of the holders of scrip or shares of a loan cannot file a bill on behalf of themselves and the other holders to have their subscriptions returned.

Several persons having distinct demands, and not being able to sue on behalf of themselves and others, cannot be co-plaintiffs.

The cases in which a bill can be filed by one person on behalf of himself and others, are cases in which the others have a choice between that and nothing. *Jones v. Garcia del Rio*, 297

4. If in the course of proceedings in a suit for specific performance, there comes out a fact, not put in issue in the cause by either party, which affects the legality of the contract, or tends to show that the contract is not fully stated in the bill, the court will direct an inquiry into the fact so disclosed. *Parker v. Whitby*, 366

POWER.

1. A power of sale and exchange vested in the trustees of a settlement, may be exercised by the trustees upon a sale to

or an exchange with the tenant for life of the settled estates.

Where upon the exercise of such a power it is declared that the estate shall be vested in the purchaser, the purchase being made in the name of a trustee, an appointment to the trustee, in trust for the purchaser, is a valid execution of the power. *Howard v. Ducane*, 81

2. A testator having a power of appointment over certain freehold and copyhold estates, and being seised of other freehold estates, devises all his freehold and copyhold estates, without reference to the power: Held an execution of the power as to the copyhold estates, but not as to the freehold estates which were subject to the power. *Lewis v. Levellyn*, 104

3. A tenant for life, with a power of appointing the property by will to all or any of the testator's children, may release or extinguish the power. *Horner v. Swan*, 430

4. A testator bequeathed certain funds in trust for his wife, during her widowhood, and after giving her a power to appoint them by deed or will, provided she did not marry again, directed that upon her second marriage, or her death without having exercised her power, they should sink into the general residue of his estate; the widow executed a deed, purporting to be an appointment of the property to the residuary legatees in the same proportions in which they would have been entitled to it under the residuary clause, and she and they concurred in assigning the funds upon trust for the residuary legatees: the court refused to act upon the appointment and assignment during the widow's life. *Goldsmid v. Goldsmid*, 445

PRACTICE.

1. After plea pleaded and replication filed, and before the plea set down, it is not a motion of course to withdraw the replication and amend the bill.

An order for that purpose, obtained of course, discharged for irregularity, and the amended bill ordered to be taken off the file. *Carleton v. L'Estrange*, 23

2. Solicitor, who had become incapable of practicing (without being re-admitted) in consequence of having neglected to obtain a certificate for one whole year, ordered to be re-admitted on payment of a

small fine only, without the arrears of duty. *Ex parte Murray*, 56

3. The rules which regulate the practice of opening biddings upon a sale of landed estate, do not apply when a colliery is the subject of sale.

Upon an offer to give 10,000*l.* for a colliery, sold for 8,850*l.*, a motion to open the biddings was refused.

The rule is not universal that biddings shall not be opened in favor of parties present at the sale.

Residuary legatee, tenant for life, or reversioner, may become the purchaser of an estate sold in the Master's office.

The person who opens the biddings is discharged if he is outbid at the sale. *Williams v. Allenborough*, 71

4. Upon a motion for a reference of title, where the performance of the contract is resisted upon other grounds, the court will look into the answer to see whether those other grounds are substantial or frivolous.

Where the subject of the contract was a life annuity, and the defendant insisted that time was of the essence of the contract, a motion for a reference to the Master upon the title was refused.

The nature of the property sold may make time of the essence of a contract. *Wilby v. Cottle*, 79

5. A solicitor has no lien upon the will of his client, and cannot refuse to produce a deed executed by the client in his favor, containing a reservation of a life interest, and a power of revocation.

Where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and the defendant cannot resist the production upon the ground of lien.

In a suit instituted against a solicitor, who had also acted in the capacity of steward, for an account and for delivery of title deeds, the court upon motion ordered the deeds to be delivered up to the plaintiff, upon payment into court of so much of the balance claimed by the answer as was not covered by any security. *Baich v. Symes*, 87

6. Where the plaintiff is misnamed in an order to dismiss a bill for want of prosecution, in consequence of an error in the six clerks' certificate, a replication filed after service of the order will not be irregular. *Semble. Verlander v. Codd*, 94

7. The court upon petition under the statute 56 Geo. 3, c. 60, will direct stock, which has been transferred to the sinking

fund, to be retransferred to the petitioners, where their title is clear, without any reference to the Master to ascertain who is beneficially entitled to the stock. *Ex parte Nicholl*, 119

8. The court will not direct a reference to the Master, as to the reduction of rent, upon the petition of a tenant. *Ex parte Town*, 137

9. Motion to stay the execution of a writ of inquiry of damages, not supported by the ordinary affidavit upon a motion to stay trial, refused with his costs. *Rodenhurst v. Tudman*, 305

10. If a bill and cross bill be filed, the plaintiff in the original bill has a right to the first answer, and may move to stay proceedings in the cross cause till the original bill is answered, though the plaintiff in the cross bill may be in a situation to enforce an answer first.

The right of the plaintiff in the original bill to make the motion, was held not to have been waived by his having taken out the common orders for time to answer the cross bill. *Harris v. Harris*, 165

11. Where the enrollment of a decree is gained by surprise, the court will vacate it. *Stevens v. Guppy*, 178

12. A defendant who has put in three insufficient answers, and is in custody for want of a fourth, is entitled to his discharge immediately on filing the fourth answer.

After a fourth answer reported insufficient, it is a motion of course, that the defendant shall be examined upon interrogatories and stand committed.

The interrogatories are to be settled by the Master, and must go directly to the points to which the exceptions are sustained.

The defendant, instead of putting in a written examination to the interrogatories, is to be examined personally upon them by the Master. *Farquharson v. Balfour*, 184

13. Where a defendant admits books in the West Indies, to be in his possession, custody or power, the court will order him to bring them here within a reasonable time, and if they are not brought, will consider it the same as if he had them here in the first instance, and refused to produce them. *Id.* 190

14. Papers belonging to a defendant are in his possession, custody or power,

although they may be in the West Indies. *Id.* 191

15. Exceptions to the Master's report of the insufficiency of a fourth answer, ordered to be heard immediately, upon the terms of the defendant's rendering himself amenable to process. *Id.* 188

16. Where one of several plaintiffs dies before answer, a motion may be made by the defendant, that the surviving plaintiffs shall within a limited time revive the suit, or that the bill shall be dismissed with costs. *Adamson v. Hall*, 258

17. A solicitor's bill having been partly taxed and paid, an order obtained as of course, referring the bill generally for taxation, was discharged with costs.

Semble, an order directing the costs of the suit to be taxed, warrants a taxation up to the time of the Master's making his report. *Clutton v. Pardon*, 301

18. Where a plaintiff amended his bill after answer, but did not serve a subpoena to answer the amendments or file a replication to the answer, an order obtained as of course to dismiss the bill for want of prosecution, after three terms from the filing of the answer, but within three terms from the date of the amendments, was held to be regular, though the defendant had obtained an order that the plaintiff should amend his bill within a limited time, and the plaintiff had amended accordingly, and had also amended the defendant's office copy of the bill. *Cooke v. Davies*, 309

19. Where a cause was not proceeded in for three clear terms after answer, the common order to dismiss the bill for want of prosecution, obtained by the defendant in the vacation after the third term, was held to be regular. *Farquharson v. Selon*, 378

20. Upon a motion for a prohibition, a copy of the libel in the ecclesiastical court verified by affidavit, and a suggestion on parchment setting forth the libel and the ground of the prohibition prayed, must be delivered into court, and if the prohibition is granted, affidavits of the truth of the facts suggested must be filed within six months. *In re Magor*, 314

21. After a plea overruled an order for time to answer, obtained as of course, is irregular. *Ferrand v. Pelham*, 404

22. A party who is served with a petition, but has no interest in the order to be

made upon it, is not entitled to the costs of appearing on the hearing of that petition. *Garey v. Whittingham*, 405

23. *Semble*, an order obtained as of course for the taxation of a bill of costs, which has been settled and paid, will not be discharged for mere irregularity, without any discussion of the merits, if the petition, seeking to discharge that order, enters into the merits of the case. *Gretton v. Leyburne*, 407

24. Where a receiver is appointed, and the person in possession refuses to attorn, or to deliver up possession, it not appearing in what right the possession is held, the proper course is to move that the person may attorn.

It is not necessary, in the first instance, to make such person a party to the suit. *Reid v. Middleton*, 455

25. Where a bill is filed to stay waste, and a demurrer is put in, the court will hear the demurrer immediately. *Const v. Harris*, 514

PREScription.

1. There may be a prescription *in non decimando* for a district; or even for a hundred.

Where a prescription *in non decimando* is set up, the party must show the specific ground upon which he claims to prescribe. *Chichester v. Sheldon*, 250

2. Strong evidence required in support of a prescription *in non decimando*. *Ib.* 251

PRESUMPTION.

Where personal access between husband and wife is established, sexual intercourse is to be presumed; and the presumption must stand till rebutted by clear and satisfactory evidence. *Head v. Head*, 138

PRINCIPAL.

SEE SURETY.

PRIORITY.

1. An officer deposited his commission as a security for a loan of money, and further covenanted with the depositary

B. to sell the commission, and to repay the loan out of the proceeds of the sale; a sale having been effected subsequently, and the regulation price having been paid to the retiring officer's agents, he transmitted to them a written order, directing them to discharge, out of the money in their hands, certain debts due from him to certain specified individuals, which individuals had no notice of his contract with B.: Held, that these creditors were entitled to a priority over B.

After the institution of the suit, the officer took the benefit of the Insolvent Debtor's Act; Held, that B. had not any title, preferable to that of the general body of the insolvent's creditors, to the surplus which remained after the debts specified in the written order were satisfied. *Collyer v. Fallon*, 459

PRODUCTION OF DOCUMENTS.

See PRACTICE, 5.

PROHIBITION.

Upon a motion for a prohibition, a copy of the libel in the ecclesiastical court verified by affidavit, and a suggestion on parchment setting forth the libel and the ground of the prohibition prayed, must be delivered into court, and if the prohibition is granted, affidavits of the truth of the facts suggested must be filed within six months. *In re Magor*, 314

R

RECEIVER.

1. Where a receiver is appointed in a suit for specific performance, if the purchaser is compelled to take the title, the receiver is to be considered as his receiver. *Boehm v. Wood*, 345

2. Where a receiver is appointed, and the person in possession refuses to attorn, or to deliver up possession, it not appearing in what right the possession is held, the proper course is to move that the person may attorn. It is not necessary in the first instance, to make such person a party to the suit. *Reid v. Middleton*, 455

3. The court will not appoint a receiver, or a manager, of any partnership concern, unless the suit be so framed, as that a decree may be made, either that the concern shall be carried on according to

the terms of an instrument, which by the agreement of the parties was to regulate the mode of its being carried on, or that it shall be wholly put an end to. *Const v. Harris*, 517

See PARTNERSHIP, 3, 4.

RECOVERY.

Equitable tenant in tail aliens in fee by way of mortgage; a good equitable recovery may be suffered of the secondary equitable estate without the concurrence of the mortgagee. *Nouaille v. Greenwood*, 26

RELATIONS.

The word "relations" means persons entitled according to the Statute of Distributions, and is a term that sufficiently describes a class of persons. *Wright v. Athyngs*, 161

REMAINDER-MAN.

See ESTATE, 4.
FAMILY ARRANGEMENT.

REMOTENESS.

See PERPETUITY, 1

RENEWAL.

1. The jurisdiction to give effect to an award, confirmed by the decree of the court in the case of a charity, is doubtful: but the renewal of a lease upon the terms of the award, having been twice directed by the court, was again enforced. *Attorney-General v. Clements*, 58

REPLICATION.

See PRACTICE, 1.

RESIDUE.

See CHILDREN, 1.
LAPSE, 1.
TENANT FOR LIFE, 1, 2.
WILL, 3, 9.

RESTS.

See ACCOUNT.

REVERSIONARY BARGAINS.

See FAMILY ARRANGEMENT, 1.

REVERSIONARY INTEREST.

3. The court refused to take the consent of a married woman to give up her reversionary interest, in part vested, and in part contingent in a fund in court, in favor of a purchaser from her husband. *Wade v. Saunders*, 306

REVIVOR.

Where one of several plaintiffs dies before answer, a motion may be made by the defendant, that the surviving plaintiffs shall within a limited time revive the suit, or that the bill shall be dismissed with costs. *Adamson v. Hall*, 258

S

SCHEDULE.

See IMPERTINENCE, 1.

SOLICITOR.

1. Solicitor who had become incapable of practicing (without being re-admitted) in consequence of having neglected to obtain a certificate for one whole year, ordered to be re-admitted on payment of a small fine only, without the arrears of duty. *Ex parte Murray*, 56

2. A solicitor has no lien upon the will of his client, and cannot refuse to produce a deed executed by the client in his favor, containing a reservation of a life interest, and a power of revocation.

In a suit instituted against a solicitor, who had also acted in the capacity of steward for an account and for delivery of title deeds, the court upon motion ordered the deeds to be delivered up to the plaintiff, upon payment into court of so much of the balance claimed by the answer as was not covered by any security. *Balch v. Symes*, 87

3. Where a client executes a deed in favor of a solicitor, reserving a life interest and a power of revocation, it is the duty of the solicitor to leave a counterpart of the deed in the hands of the client. *Id.*, 92

4. Where a party has a pressing necessity for papers in the hands of his solicitor, the court will order them to be delivered up upon a deposit being made sufficient to cover the amount of the solicitor's bill and the costs of the taxation. *Clutton v. Pardon*, 301

5. A solicitor cannot obtain the taxation of his agent's bill without bringing the amount into court. *Ostle v. Christian*, 324

6. A solicitor, who has declined to proceed with a cause, will be ordered, though his bills of costs are not paid, to deliver up the papers to the present solicitor of the party, the latter undertaking to hold them subject to the former solicitor's lien, for what shall be found due to him on the taxation of the bills.

An offer on the part of the former solicitor, after the motion is made, to proceed with the cause, will not prevent the court from ordering him to deliver up the papers on the terms mentioned above. *Colegrave v. Manby*, 400

See Costs, 2.

SPECIFIC PERFORMANCE.

1. The author of a voluntary settlement cannot file a bill for the specific performance of a contract afterwards entered into by him to sell the settled estate.

Whether his creditors after his death can maintain such a bill. *Quere*.

The court was of opinion, that limitations in a marriage settlement to the brothers of the settlor and their issue were voluntary; but thought, under the circumstances, that a purchaser could not be compelled to take the title depending on the validity of those limitations, and dismissed a bill by the creditors of the vendor after his death for specific performance, there having been subsequent dealings with the estate which might have confirmed the settlement, the agreement for purchase being suspicious, and it being doubtful whether the creditors could file such a bill. *Johnson v. Legard*, 281

2. In a suit against a purchaser for specific performance, where a receiver had been appointed and was in possession of the estate, and the Master's report in favor of the title, except as to a very small part of the estate for which the purchaser was entitled to an abatement, had been confirmed, and followed by an order, by which, after referring it to the Master to ascertain

what abatement the purchaser was entitled to, and to compute interest upon the remainder of the purchase money, and to settle the conveyances, it was ordered, that upon the execution of the conveyances and delivery thereof, and of the title deeds to the purchaser, he should pay to the plaintiffs the remainder of the purchase money, after deducting the abatement, with the interest to be computed by the Master, and that the receiver should thereupon deliver up to him possession of the estate, the court refused to discharge a writ of *ne exeat regno* issued against the purchaser, and marked for the full amount of the purchase money, though the abatement (which it clearly appeared would be less than the interest) had not been ascertained by the Master, and no steps had been taken towards the execution of the conveyances. *Boehm v. Wood*, 332

3. Where a receiver is appointed in a suit for specific performance, if the purchaser is compelled to take the title, the receiver is to be considered as his receiver. *Boehm v. Wood*, 345

4. The person entitled to the reversion in fee of a house, expectant upon a term vested in a lessee who has demised the premises for a portion of his term to a sub-lessee, agrees by one letter to grant that sub-lessee an *extension of lease* at a certain yearly rent, and, in another letter, fixes the time, when the term which he thus proposes to grant, is to expire; this is a valid agreement within the Statute of Frauds, and, under it, the sub-lessee, has a right to a lease which shall commence from the expiration of the existing term. *Verlander v. Codd*, 352

5. Specific performance will not be decreed of an agreement to sell certain property at a price to be settled by two persons who are named, if the court sees reason to believe, that the price subsequently fixed by these persons, is considerably below the real value of the property. *Parcken v. Whitby*, 366

6. Where in a suit by a vendor for specific performance, the Master reported in favor of the title, but the court, on an exception taken by the purchaser, deemed the title doubtful, an order was made dismissing the bill without costs, but neither allowing nor disallowing the exception. *Willcox v. Bellaers*, 491

7. Devise of several estates to A. for life, with remainder to trustees to preserve contingent remainders, with remainder to

the first and other sons of A. in tail male, with divers remainders over, with power to the persons from time to time entitled to the estates, devised to lease all such estates except an estate called Juts, and with a direction that the persons who should be entitled to and possessed of the devised estates, should not lease the estate called Juts, or any part thereof; and that every such person should live and reside on the said estate called Juts, and for default thereof all the devised estates to go over to the person next in succession, as if the person refusing or neglecting to reside or live at Juts was actually dead.

Held, in a suit by parties making title under a recovery suffered by A. and his eldest son against a purchaser, for specific performance, that it was too uncertain what the testator meant by the words "live and reside" for the court to determine that there had been a forfeiture; and a specific performance decreed. *Ful-lingham v. Bromley*, 530

STATUTES.

2 & 3 Edw. 6, c. 13.	315
9 & 10 Will. 3, c. 15.	121
36 Geo. 3, c. 90.	330
56 Geo. 3, c. 60.	119

See FRAUDS (Statute of),
LIMITATIONS (Statute of).

SURETY.

1. Where two persons execute a bond, the one as principal, the other as security, and no other assurance is executed at the time, the surety paying the bond debt is only a simple contract creditor of the principal. *Copis v. Middleton*, 224

2. It is a general rule that in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal; the rule, however, must be qualified, by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor. *Ib.* 229

3. Where a bond is given by principal and surety, and at the same time a mortgage is made for securing the debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee. *Ib.* 231

4. A. and B. entered into a joint and several bond for securing a sum of money advanced to A. by his bankers. After the execution of the bond, and before it became due, A. paid money to the bank-

ers, and he continued to draw upon them until his banking account was overdrawn. Some years afterwards an account was settled between A. and the bankers, in which the whole money secured by the bond was treated as remaining due from A. The bankers then took a warrant of attorney from A. for securing payment of the balance found due upon the settlement by instalments at distant periods. Several of the instalments were paid, but A. became bankrupt before the whole debt was liquidated. It being proved that B. was privy to the settlement of accounts between A. and the bankers, and to the arrangement respecting the warrant of attorney: Held, first that B. was not discharged by the time given to A., and secondly, that the bond was not discharged by the course of payment, the money paid by A. to the bankers being applicable to the banking account, and the bankers being entitled to hold the bond and warrant of attorney as distinct securities.

Upon the occasion of the bond being executed, the title deeds of an estate purchased by A. were deposited with B. as an indemnity against his liability upon the bond, the legal interest in the estate was likewise conveyed to B., and it was agreed that he should also hold it as an indemnity. After the death of B. his executor delivered up the title deeds to A., upon a false representation by him that the bond had been paid off: Held, that a conveyance of the legal estate could not be compelled until the indemnity was worked out, and that the lien upon the title deeds remained. *Tyson v. Cox*, 395

5. Where sureties are bound by different instruments for equal portions of a debt due from the same principal, and the suretyship of each is a separate and distinct transaction, there is no right of contribution between them. *Coope v. Twynham*, 426

T

TAXATION.

1. Where a party has a pressing necessity for papers in the hands of his solicitor, the court will order them to be delivered up upon a deposit being made sufficient to cover the amount of the solicitor's bill and the costs of the taxation. *Chilton v. Pardon*, 304

2. A solicitor cannot obtain the taxation of his agent's bill without bringing the amount into court. *Osile v. Christian*, 324

3. A bill of costs, where the amount of it has been settled between the solicitor and client, and part of it has been paid and security given for the remainder, will not be ordered to be taxed, merely because it contains charges which would be disallowed on taxation.

Semble, an order obtained as of course, for the taxation of a bill of costs, which has been settled and paid, will not be discharged for mere irregularity, without any discussion of the merits, if the petition, seeking to discharge that order, enters into the merits of the case. *Gretton v. Leyburne*, 407

TENANT FOR LIFE.

1. Testator, having devised lands to A. for life, remainder to his children in strict settlement, directs the residue of his personal estate, subject to the payment of debts and legacies, with all convenient speed to be laid out in the purchase of lands, to be settled forthwith to the same uses, with a proviso, that the trust moneys, until they should be laid out, might be invested upon government or real securities, the dividends and interest of which were to go and be paid as the rents of the lands to be purchased would go and be payable; a large portion of the testator's personal estate, not required for the payment of debts and legacies, being invested in the funds, and upon securities carrying interest, the tenant for life was held entitled to the interest of that portion from the death of the testator. *Angerstein v. Martin*, 232

2. Testator directs his executors to invest the residue of his estate, after payment of debts and legacies, in the funds or upon securities, the interest to be paid to A. for life, and after his death, the principal to be held upon trusts for his children; the tenant for life was held to be entitled to interest, accruing within the year next after the testator's decease—upon funds on which the testator's property stood invested at the time of his death, and which were not required for the payment of debts and legacies. *Hewitt v. Morris*, 241

3. A tenant for life, with a power of appointing the property by will to all or any of the testator's children, may release or extinguish the power. *Horner v. Swan*, 430

See ESTATE, 4.

TIMBER.

See INJUNCTION, 2.

TIME (LENGTH OF).

1. Where there has been adverse possession, not accounted for by some disability, as coverture or infancy for twenty years, a court of equity ought not to interfere. *Cholmondeley v. Clinton*, 108

2. An estate being in lease, A. enters and receives the rents during the continuance of the lease, and afterwards continues in possession, up to a period more than twenty years distant from the time of his entry. Within twenty years after the expiration of the lease, B. brings an ejectment, and files a bill for discovery; though the ejectment might be maintained at law, a demurrer to the discovery is good. *Cholmondeley v. Clinton*, 107

See FAMILY ARRANGEMENT, 1.

TITHES.

1. Wood springing from the roots or stools of trees is tithable, and neither its own age, nor the age of the trees from the roots or stools of which it sprung, will exempt it. *Chichester v. Sheldon*, 245

2. There may be a prescription *in non decimando* for a district, or even for a hundred.

Where a prescription *in non decimando* is set up, the party must show the specific ground upon which he claims to prescribe. *Id.* 250

TRUST.

To create a trust by means of an obligation imposed upon the conscience of a devisee, the words must be imperative, the subject must be certain, and the object as certain as the subject.

The words "in the fullest confidence" are imperative. *Wright v. Atkins*, 157

2. A sum of money was paid by A. to B., for the purpose of purchasing C. promotion in the army, and it remained unapplied in the hands of B. at the death of A. C. having been compelled from the bad state of his health to quit the army, and having no prospect of being able to enter into the service again, filed a bill

for the money, and it was decreed to be paid to him. *Lache v. Lord Kilmorey*, 207

3. A trust to be carried into execution by the court, must be of such a nature that it can be under the control of the court. *Ommanney v. Butler*, 270

TRUSTEE.

A trustee who is in a state of mind which renders him incompetent to the management of business, may refuse to transfer within the meaning of the 36 G. 3, c. 90, s. 1. *West v. Ayles*, 330

See EXECUTOR, 1.

V

VENDOR AND PURCHASER.

1. The rules which regulate the practice of opening biddings upon a sale of landed estate, do not apply when a colliery is the subject of sale.

Upon an offer to give 10,000*l.* for a colliery, sold for 8,850*l.*, a motion to open the biddings was refused. *Williams v. Attenborough*, 70

2. The rule is not universal that biddings shall not be opened in favor of parties present at the sale.

Residuary legatee, tenant for life, or reversioner, may become the purchaser of an estate sold in the Master's office. *Th.* 76

See CONVERSION, 1.
SPECIFIC PERFORMANCE.

VOLUNTARY SETTLEMENT.

1. The author of a voluntary settlement cannot file a bill for the specific performance of a contract afterwards entered into by him to sell the settled estate.

Whether his creditors after his death can maintain such a bill. *Quere.*

The court was of opinion that limitations in a marriage settlement to the brothers of the settlor and their issue were voluntary; but thought under the circumstances, that a purchaser could not be compelled to take the title depending on the validity of those limitations, and dismissed a bill by the creditors of the vendor after his death for specific performance, there having been subsequent deal-

ings with the estate which might have confirmed the settlement, the agreement for purchase being suspicious, and it being doubtful whether the creditors could file such a bill. *Johnson v. Legard*, 281

2. A voluntary settlement may be made good by matter *ex post facto*. *Th.* 294

VOLUNTARY TRUST.

See TRUST, 2.

W

WILL.

1. Devise to A. for ninety-nine years, if he should so long live: remainder to his first son, then unborn, for ninety-nine years, if he should so long live; and so on in tail male to such first son lawfully issuing forever; and for want and in default of such issue of such first son, to the second and other sons successively for ninety-nine years, only in case he should so long live; and that such elder son or the issue of such elder son should have no greater estate than for ninety-nine years, determinable at his decease; and if there should be no issue male of A., at the time of his (A.'s) death, or in case there should be such issue male at that time, and they should all die before twenty-one without issue male, then to B. for ninety-nine years, if he should so long live; remainder to the first son of B. for ninety-nine years, if he should so long live, &c.: held, that A. took under the will an estate for ninety-nine years in the freehold estates, determinable with his life, and the same estate in the leaseholds, if they should so long continue; and that, upon his death, his first son would take an estate for ninety-nine years in the freehold, determinable with his life, and the remainder of the term in the leaseholds: but that the limitations to the second and other unborn sons of A. were void, as tending to perpetuity; and the limitations over to B., &c., after these void limitations were not accelerated, but were void also. *Beard v. Westcott*, 25

2. Executor taking a contingent reversionary interest under a will, not precluded from giving evidence of the intention that he should have the residue beneficially, nothing upon the face of the will indicating that he was to take the office merely.

Under the effect of the will and the evidence the executor was declared to be entitled beneficially.

Whether the contingent reversionary interest would have had the effect of rendering him a trustee for the next of kin? *Quare. Lynn v. Beaver,* 63

The motives which might influence the testator in favor of the executor are to be considered in determining the question, whether the executor takes the residue beneficially. *Ib.* 68

Bequest in terms importing an intention not to make an immediate disposition, may upon the construction of the whole will, amount to a present bequest. *Lynn v. Beaver,* 67

3 A testator having a power of appointment over certain freehold and copyhold estates, and being seised of other freehold estates, devises all his freehold and copyhold estates, without reference to the power: Held an execution of the power as to the copyhold estates, but not as to the freehold estates which were subject to the power. *Lewis v. Levellyn,* 104

4. Devise to A. and her heirs forever, in the fullest confidence that after her decease she will devise the property to my family; A. is tenant in fee. *Wright v. Atkins,* 143

Under an immediate devise to A. for life, remainder to "my family," the heir at law of the testator is entitled in remainder. *Ib.* 156

5. A legacy given to a married woman "for her own use and at her own disposal" vests in her as separate estate. *Prichard v. Ames,* 222

6. Testator, having devised lands to A. for life, remainder to his children in strict settlement, directs the residue of his personal estate, subject to the payment of debts and legacies, with all convenient speed to be laid out in the purchase of lands, to be settled forthwith to the same uses, with a proviso, that the trust moneys, until they should be laid out, might be invested upon government or real securities, the dividends and interest of which were to go and be paid as the rents of the lands to be purchased would go and be payable; a large portion of the testator's personal estate, not required for the payment of debts and legacies, being invested in the funds, and upon securi-

ties carrying interest, the tenant for life was held entitled to the interest of that portion from the death of the testator. *Angerstein v. Martin,* 232

7. Testator directs his executors to invest the residue of his estate, after payment of debts and legacies, in the funds or upon securities, the interest to be paid to A. for life, and after his death the principal to be held upon trusts for his children; the tenant for life was held to be entitled to interest, accruing within the year next after the testator's decease, upon funds on which the testator's property stood invested at the time of his death, and which were not required for the payment of debts and legacies. *Hewitt v. Morris,* 241

8. Testator after bequeathing to A. and B. legacies of stock unequal in amount, and giving several legacies to public charities, requests the said A. and B. to be his executors, and gives to them as such 100 guineas each. He then orders his books, jewels, plate and household furniture to be sold; and after desiring mourning to be provided for his servants, and five guineas each to be given to several persons named in the will and to his two executors for a ring as a token of remembrance, concludes his will in the following manner:—"In case there is any money remaining, I should wish it to be given in private charity." Held, that the general residue of the testator's personal estate, consisting of a leasehold estate, money in the funds, and a balance in cash, was not comprehended in the residuary clause, which was confined to the residue of the produce of the articles which the testator directed to be sold; that private charity was an object too indefinite to give the crown jurisdiction, or to enable the court to execute the trust; that the executors having, as executors, equal legacies, could not take beneficially, and that the next of kin were therefore entitled to the general residue of the testator's personal estate, including what was comprehended in the residuary clause. *Omnanney v. Bulcher,* 260

9. Testatrix, by her will, disposes of certain long annuities, and of a sum in cash, and then uses the following words: "I believe there will be sufficient money left to pay my funeral expenses."

By a codicil to her will the testatrix expresses herself thus:—"If there is money left unemployed, I desire it may be given in charity."

Held, that the general residue of the testatrix's personal estate, including a sum of 2,500*l.* trust moneys, in which she had a vested reversionary interest, at the time of her death, subject to be divested by the appointment of her mother, passed under the words "money, left unemployed," and was well given to charity. *Legge v. Asgill*, 265, 266

10. Where real estates are devised in trust for the payment of debts, in aid of the personal estate, the Statute of Limitation does not run in equity after the death of the testator. *Hughes v. Wynne*, 307

11. Illegitimate children not entitled under the description of children, the intention not being sufficiently apparent upon the face of the will.

Legacy in trust for the children of A. to be equally divided between them, with benefit of survivorship, and a provision for maintenance out of the interest, A. having no children at the death of the testator: Held, that after-born children would take, and that the interest till the birth of a child fell into the residue. *Harris v. Lloyd*, 310

12. A testator gives a sum of stock to trustees, of which they are to stand possessed upon trust for D. G. until he shall attain the age of twenty-five years, and are to transfer to him when they in their discretion shall think proper; he likewise directs, that if D. G. dies without lawful issue before receiving the bequest, the stock shall sink into the residue of his, the testator's estate; and he bequeaths the residue to W. F.; while D. G. is under twenty-five years of age, and has not had the stock transferred to him, neither he nor W. F. is entitled to receive the accruing dividends; but these dividends must accumulate, to accompany the capital in its final destination. *Gordon v. Rutherford*, 373

13. A testator directs, that W. F. shall, with a capital taken out of his assets, continue his, the testator's business; that he shall bind D. G. apprentice to himself; that he shall take D. G. into partnership at the end of his apprenticeship, or so soon after as he shall think him capable; and that D. G. shall have one-third of the profits of the business: D. G. is not entitled to claim any share of the profits which are made before he is admitted into partnership. *Gordon v. Rutherford*, 375

14. A testator bequeaths the residue of his property to his nephews and nieces, on

their respectively attaining twenty-five, with a direction that his trustees shall, in the meantime apply the profits to their maintenance; but in case of the death of any of them unmarried and without issue, he gives the shares of those so dying unto the survivors equally, to be paid at the same time with their original shares; first a nephew and then a niece die, under twenty-five, unmarried and without issue; the whole residue is divisible among the survivors who attain the specified age, and the niece does not, upon the death of the nephew, acquire, under the clause of survivorship, a vested interest in her proportional part of his share. *Barker v. Lea*, 413

15. A testator, having first directed all his debts to be paid, bequeaths all his copyhold estates, and all his property whatsoever, to his wife, during her life, and after her decease to his surviving children, and appoints A. and B. his executors: the debts are charged on the copyhold estate. *Ronalds v. Feltham*, 418

16. A testator directs his executors and trustees to pay certain annuities and legacies, "clear of the property tax, and all expenses attending the same;" the legacy duty ought to be paid by the executors out of the assets of the testator, and the annuitants and legatees are entitled to receive the full amount of their respective legacies and annuities, without any deduction in respect of legacy duty. *Courlay v. Vincent*, 433

17. A testator directs that his executors pay to A. B. a yearly sum as wages, so long as she should continue in his wife's service, and if she continued in such service, that the payment should be made to her quarterly, free from all deductions, to cease in case she should leave the service of his wife, until the decease of his wife. The testator's wife died in his lifetime. Held, that A. B. was entitled to the annuity during her life. *Burchett v. Woolward*, 442

18. Construction of words of a devise as to giving an estate tail. *Willcox v. Belknap*, 491

See EXECUTOR, 1.

WOOD.

See TITHES, 1.

WORDS.

See DESCENDANTS.
RELATIONS.

Y

YORK (CUSTOM OF).

Where a testator, resident and domiciled at the time of his death within the

province of York, disposes of all the residue of his personal estate, and names executors, but his disposition falls as to part of the residue, by the death of one of the residuary legatees in his lifetime, the share which thus becomes lapsed, will be apportioned between the widow and the next of kin, according to the Statute of Distributions, and will not be affected by the custom of the province. *Wilkinson v. Atkinson*, 255

REPORTS OF CASES
DECIDED IN THE
HIGH COURT OF CHANCERY,

BY THE
RIGHT HON. SIR JOHN LEACH,
MASTER OF THE ROLLS.

~~~~~  
BY JOHN TAMLYN,  
OF GRAY'S INN, ESQ., BARRISTER AT LAW.  
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WITH NOTES AND REFERENCES

TO ENGLISH AND AMERICAN DECISIONS,

BY THOS. W. WATERMAN,
COUNSELLOR AT LAW.

VOLUME I.

—◆◆—
NEW YORK:
BANKS, GOULD & CO., 144 NASSAU STREET.
ALBANY:
GOULD, BANKS & CO., 475 BROADWAY.
1855.

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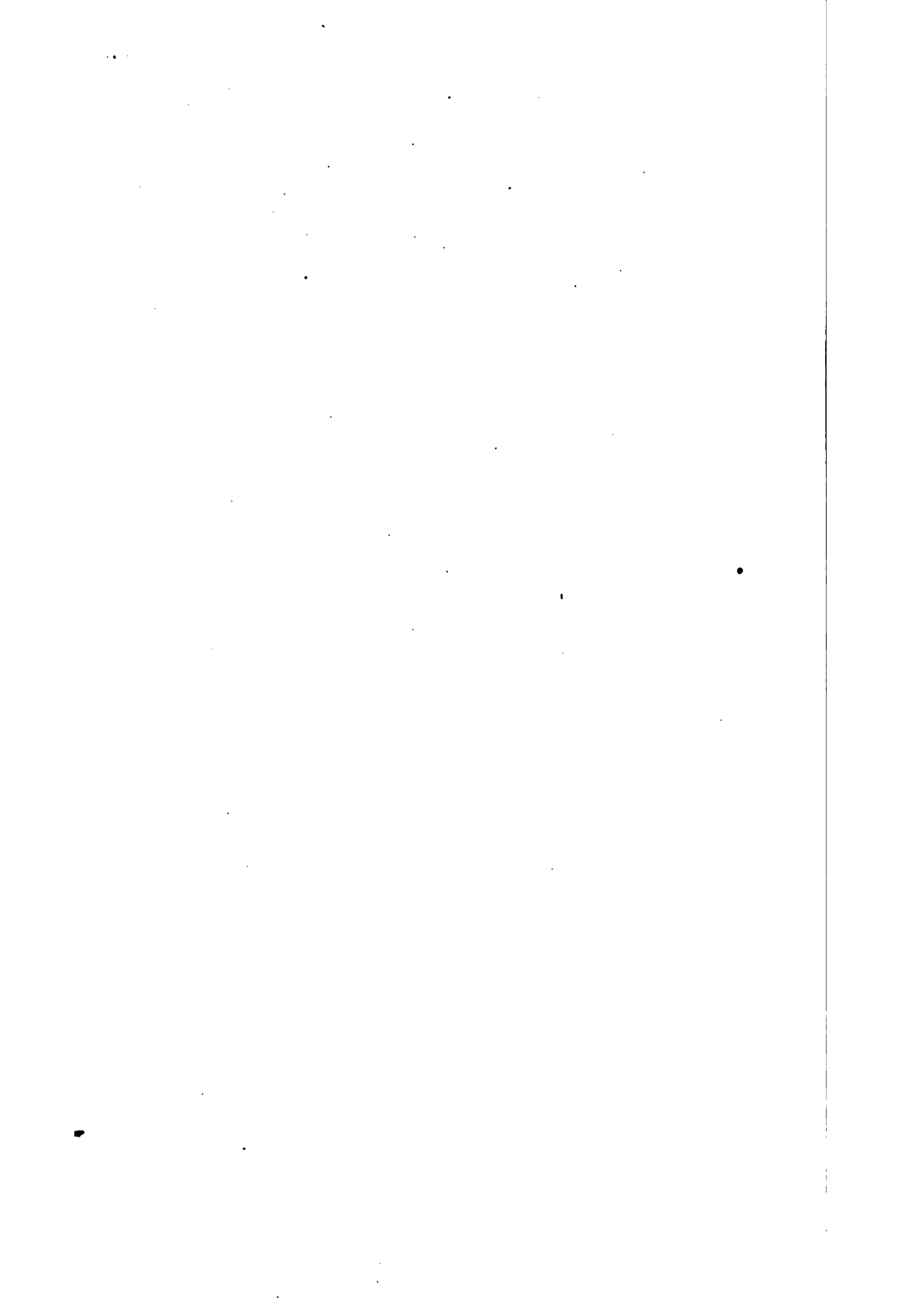
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

CHARLES FORDHAM AND WM. FORDHAM, *Plaintiffs*; AND ISAAC ROLFE AND MYRINDA CODLING, *Defendants*.

Parties.—Heir at Law.—Personal Representatives.

WESTMINSTER HALL.—1829: 23d June.

A., by will, directed his debts to be paid out of his personal estate, and the deficiency to be made up out of his real estate; and subject thereto, he devised his copyhold messuages. Testator died. A creditor's bill was then filed, but neither the heir at law nor any personal representative were parties; in fact, the will had not been proved; there was no personal estate: Held, that administration *cum test. annexo* must be taken out, and that the administrator and heir at law must be parties. Bill to be so amended.

WILLIAM PRATT, by his will dated 5th September, 1818, directed that all his just debts, and funeral and testamentary expenses, should be fully paid and satisfied out of his personal estate and effects, if the same were sufficient for that purpose; but if not, then the deficiency to be made up out of his real estate thereafter devised. And subject thereto, he gave and devised *unto his wife Susannah and her assigns, several [*2] copyhold messuages, to hold unto his said wife and her assigns, for and during the term of her natural life, provided she should so long continue his widow and unmarried, and subject to the mortgages and other incumbrances thereon, with remain-

 1829.—*Fordham v. Rolfe*.

der to the defendant, Myrinda Codling, her heirs and assigns forever. The testator appointed his wife, Susannah, and defendant, Isaac Rolfe, executors. The testator and his widow are both dead. This bill was filed by the plaintiffs as the judgment creditors of William Pratt, deceased, on behalf of themselves and his other creditors. The bill stated the preceding facts, and that the executors had not proved the will; but that the personal property being under 5*l.*, Susannah Pratt had exhibited the will in the court of the archdeaconry of Sudbury, in order to be filed and registered, and the same was filed and registered accordingly, and that the defendant Rolfe had possessed some personal estate and effects of the testator. The bill prayed that an account might be taken of what was due and owing to the plaintiff and the other creditors of the testator, and that all the debts might be paid and satisfied out of the said copyhold premises, and that the said copyhold premises might be sold for that purpose. The only defendants were Myrinda Codling and Isaac Rolfe; the heir at law was not a party.

Mr. *Lovat* for the plaintiffs:—The testator having left no personal estate, the executors refused to prove the will, and no other person would administer. The heir at law is an infant, but not a party, nor is it necessary he should be. He submitted that the decree should be for an account of the debts, and for sale of the copyholds.

THE MASTER OF THE ROLLS:—I cannot do that. Why do you not take out administration? The account of the [*3] *personal estate must be first taken, in order to show there is a deficiency of personal assets, and for that purpose an administration, with the will annexed, must be obtained. The heir at law must be a party. The will cannot be decreed to be well proved in his absence. Let it stand over, with leave to make the administrator and heir parties.

Note.—It is always desirable to have the will declared to have been well proved, and that can only be obtained, by the heir at law being a party to the bill.

In a case of possession by the devisee for several years, Sir Joseph Jekyll, Master of the Rolls, is said to have decreed a sale without the heir at law being a party;

 1829.—In the Matter of Moody.

(*Harris v. Ingledew*, 3 P. W. 92;) and Mr Cox, in a note, adds, that it appears by the register's books, that the will of the testator was declared to be well proved; but the learned judge himself said in that very case, "that the objection of the heir at law not being a party, seemed to be a material objection; for since the sale of the estate must affect all the devisees in proportion, and as the estate would not, without the heir being a party to the decree, sell for near the value, this might be a wrong to all the devisees, and occasion more of their lands to be sold than would perhaps be otherwise necessary."

By a report in Brown, of the case of *Williams v. Whynates*, (2 B. C. C. 399,) where the heir at law was in the East Indies, it is said that the Lord Chancellor declared the will to be well proved. This, however, could not bind the heir at law, he not being a party to the suit, nor insure the title under it against his claims. In *Thompson v. Topham*, (1 Yo. & Jer. 556,) in the Exchequer, to which the heir at law was not a party, by reason of his being out of the jurisdiction, the court merely decreed the trusts of the will to be carried into execution. Indeed, the counsel in that case did not even ask for a declaration that the will was well proved, as it would be contrary to practice, and if inserted, would not bind persons absent; (Ld. Redesdale, 139, 140, 3d. ed.;) but it is not a good exception to a report of good title that the heir at law was not a party. *Wakeman v. Duchess of Rutland*, 3 Ves. jun. 232.

The heir at law should be made defendant, and not co-plaintiff, when any deed, will, &c., is to be proved against him. *Phunkel v. Joice*, 2 Sch. & Lef. 159.

*IN THE MATTER OF HENRIETTA MOODY, AN INFANT. [*4]

Infant Trustee.—Constructive Trusts.

WESTMINSTER HALL.—1829: 22d June.

A. contracted to sell a freehold estate to B., and by his will gave the purchase-money and the interest to become due in the meantime to trustees, for certain purposes; and if the contract should not be completed, he devised the freehold estate to the trustees upon trust, to sell the same, and apply the purchase money to the like purposes.

A. died, leaving a son, his heir at law, who died, leaving an only daughter, his heiress at law, an infant. The court held, that she was not a trustee within the act 6 G. IV, c. 74, and dismissed a petition that the infant might be ordered to convey.

THIS was the petition of John Davies, Esquire, the acting executor of the will of the Rev. William Moody, deceased.

The petition set forth an order referring it to the master to inquire, whether Henrietta Moody were an infant, and a trustee of

1829.—In the Matter of Moody.

certain estates within the intent and meaning of the act of Parliament passed in the sixth year of the reign of his present Majesty, c. 74, and for whom?

The master, by his report, certified that a state of facts had been laid before him, setting forth that the Rev. William Moody, clerk, deceased, being seised of certain freehold and leasehold hereditaments, entered into a contract in writing, with William Wyndham, Esquire, for the sale, at the sum 17,600*l.*, of certain freehold manors. That William Moody, by his will duly executed reciting the said contract, gave, devised and bequeathed unto Edward Duke, John Davies and Henry Moody, thereafter appointed executors in trust of his will, the said sum of 17,600*l.*, and the interest in the meantime to become due, to hold the same unto the said Edward Duke, John Davies and Henry Moody, their executors, administrators and assigns, upon trust, to receive and apply the same in the manner therein mentioned; and in case, by any unforeseen accident, the said contract with the said William Wyndham should not be carried into full effect, and the said sum of 17,600*l.* should not be paid, and the said [*5] lands should not be *conveyed to the said William Wyndham, then the said testator's will and mind was, and he thereby gave, devised and bequeathed the said freehold and leasehold messuages, lands, cottages, tenements and hereditaments, to his executors, the said Edward Duke, John Davies and Henry Moody, in trust, to hold to them and their heirs and assigns forever upon trust, with all convenient speed to sell the same, and to apply the purchase money thereof according to the same uses and trusts as were thereinbefore expressed concerning the said sum of 17,600*l.*; and the said testator appointed the said Edward Duke, John Davies and Henry Moody executors in trust of his said will. That the said William Moody departed this life on or about the 20th day of April, 1827, without altering or revoking his said will; and that the said Edward Duke renounced all his right, title and interest in and to the probate and execution of the said will of the said William Moody; and that, in the same year, 1827, the said John Davies and Henry Moody (since deceased) duly proved the said will in the Prerogative Court of the

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Archbishop of Canterbury. And the said state of facts further stated, that upon the decease of the said William Moody, the freehold manor, messuages, cottages, lands, tenements and hereditaments so contracted to be sold to the said William Wyndham, as aforesaid, descended to the said Henry Moody, his eldest son and heir at law, subject to the devise contained in the said will of the said William Moody, in case the contract with the said William Wyndham should not be carried into effect. That the said Henry Moody, on or about the 4th day of October, 1827, intermarried with Felicia Julia Marianne Seagrave, spinster, and that he departed this life intestate as to any real estate, on or about the 23d day of December in the same year; that there was issue of the said marriage, a posthumous daughter, (that is to say) *the said infant, Henrietta Moody, who [*6] was born in the month of July, 1828; that the said John Davies, therefore, submitted that the said Henrietta Moody was a trustee of the legal estate of the said freehold manor, messuages, cottages, lands, tenements and hereditaments so contracted to be sold to the said William Wyndham, within the intent and meaning of the second section of the statute passed in the sixth year of the reign of his present Majesty, intituled "An act for consolidating and amending the laws relating to conveyances and transfers of estates and funds vested in trustees who are infants, idiots, lunatics, or trustees of unsound mind, and who cannot be compelled, or refuse to act;" and that she was such trustee for the said William Wyndham, the purchaser. And on consideration of the said state of facts, and the evidence which had been produced and read before him in support thereof, the master found that the said Henrietta Moody was an infant; but he was of opinion that she was not, under the circumstances therein stated, a trustee of the estates in the said petition and order mentioned, within the intent and meaning of the act 6 G. IV, c. 74. The petitioner submitted that the said Henrietta Moody was a trustee of the estates, within the intent and meaning of the said act of Parliament, for and on behalf of the said William Wyndham, to whom the said estates were contracted to be sold as aforesaid; and prayed that the said Henrietta Moody might be directed to execute all proper and necessary conveyances of and relating to

 1829.—In the Matter of Moody.

the said estates so contracted to be sold to the said William Wyndham; and that all proper and necessary parties might be directed to join in and execute all such conveyances, or that the said master might be directed to review his said report.

Mr. *Wright* for the petitioner: This is an application under the second and tenth sections of the statute 6 G. IV, [*7] *c. 74.(a) That statute repealed the statute of 7 Ann.

(a) By the 7 Ann. c. 19, after reciting that many inconveniences did and might arise, by reason that persons under the age of one and twenty years, having estates in lands, tenements, or hereditaments, only in trust for others, or by way of mortgage, could not convey any sure estate in any such lands, tenements, or hereditaments, to any other person or persons; it is enacted, that it shall be lawful for such person or persons under age, by order in Chancery or Exchequer, on petition as therein mentioned, to convey and assure any such lands, &c., as by such order should be directed, and that such conveyance should be as good as if the infant were of full age.

6 G. IV, c. 74, s. 2. "And be it further enacted, that when and so often as any person or persons seized or possessed of any lands, tenements, or hereditaments, or other property, or any estate or interest therein, upon any trust or trust, or by way of mortgage, shall be under the age of twenty-one years, it shall be lawful for such infant or infants, by the direction of the Court of Chancery or Exchequer, [or some provincial courts therein mentioned,] to convey, release, surrender, assign, or otherwise assure such lands, tenements, or hereditaments, or property or estate, or interest therein, to such person or persons, and in such manner as the said courts respectively shall think proper and direct; and every such conveyance, release, surrender, assignment, or assurance shall be as valid and effectual, to all intents and purposes, as if the said person or persons, being an infant or infants, were at the time of executing the same of the full age of twenty-one years."

Sec. 10. "And be it further enacted, that the several provisions hereinbefore contained shall extend and be construed to cases in which a trustee or trustees may have some beneficial estate or interest in the lands, tenements, hereditaments, property, stocks, funds, annuities, or securities vested in him, her, or them as aforesaid, and also to cases in which the trustee or trustees may have some duty or duties to perform, so as to enable conveyances and other conveyances and transfers to be made, in order to vest any lands, tenements, property, stocks, funds, annuities or securities in a new trustee or trustees, duly appointed in the place of such trustee or trustees, by virtue of some power or authority, or by the Court of Chancery or Exchequer, either alone or jointly with any continuing trustee or trustees, (as the case may require.)"

We have brought together the sections of the respective acts of Anne and his present Majesty, in order that it may be seen how far they differ, and to facilitate the means of judging to what extent the decisions on the repealed law control or explain the substituted enactments. In our humble opinion, the second section of

chapter 19, for enabling infants to convey; and under that statute there were several cases in which the court had directed infant trustees and mortgagees to convey the legal estate.

*In the case of *Holesworth v. Lane*,(a) a reference had been [*8] made to the master to inquire whether the heir of a mortgagee came within the act of Anne, and the master reported in the affirmative; and, thereupon, an order was made that the heir should assign over the mortgage to such persons as the executor should appoint; whereupon a motion was made on the part of the defendant to set aside the report, alleging that the heir was not a trustee for the executor within the meaning of that act, for the heir of the mortgagee was a trustee for his executor only by implication of law; but it was argued, on the other hand, that implied trusts were within the act; and the case of *Bertie v. Vernon* was relied upon, in which Lord Chancellor King(b) decided that the heir of a vendee was a trustee, within the act of Anne, for a person who had paid the purchase money; and in this case of **Holesworth v. Lane* it was held that the heir [*9] was trustee for the executor, and that the very inconvenience the statute was made to remedy was that the parties should not be obliged to wait the full age of the heir. In the cases of *Attorney-General v. Pomfret*,(c) and *Ex parte Bellamy*,(d) infants

the act of his present Majesty is to the same effect as the repealed act, except that it does not repeat the mode of proceeding to be by petition, which, however, is provided for in the eighth section; and, if we are correct in this opinion, the decisions of the latter apply strictly to the former. It remains, then, to be seen, whether the tenth section enlarges it; and as to that, we conceive it has no influence upon constructive trusts, but simply effects this, that where there is an express trust, it shall come with the jurisdiction given by the act, in cases in which the infant trustee is beneficially interested, and in cases in which he has a duty to perform, so as to enable conveyances to be made in order to vest property in new trustees.

(a) Moseley's Rep. 197.

(b) 2 P. Wms. 549. The Lord Chancellor King, in the case *Ex parte Vernon*, said that where there was no declaration of trust in writing, he should, for the future, leave the *cestui que trust* to bring his bill, and have a decree against the infant to convey, because these orders for an infant trustee to convey ought to be in the plainest cases, and not in such as are subject to the disputes which trusts without writing might be liable to.

(c) 1 Cox, 221.

(d) 1 Cox, 422.

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were directed to convey. In *Goodwin v. Lister*,^(a) the Lord Chancellor Talbot held, there could be no doubt of the construction of the act with regard to express trusts by deed; and that an infant, being a mere trustee, might be ordered to convey, for there was no inconvenience in directing an infant to part with an estate which was of no benefit to him.^(b)

In the cases of — *v. Handcock*^(c) before Lord Eldon, and *Ex parte Marshall* at the Rolls in 1797,^(d) and in a former case by Lord Thurlow,^(e) infant heirs at law of mortgagees were held to be trustees under the statute of Anne. The objection in the case of *Ex parte Chasteney*,^(g) was remedied by the late act, 6 G. IV, c. 74.

Mr. Jacob, for the purchaser, was disposed to consent to the petition, if his Honor thought the purchaser would be safe in taking a conveyance from the infant; but in *Dew v. Clarke*,^(h) the Lord Chancellor was understood to be of opinion, that the act 6 G. IV, c. 74, did not apply to cases of constructive trusts; and in the case of *King v. Turner*,⁽ⁱ⁾ lately heard before [*10] the Vice-Chancellor, *where a person had covenanted to

- surrender a copyhold to trustees for his creditors, he died

(a) 5 P. W. 387.

(b) That learned lord added, that he did not think constructive trusts to be within the view of that act of Parliament.

(c) 17 Ves. 383.

(d) 17 Ves. 383, (2d ed.,) note.

(e) 17 Ves. 383, (2d ed.,) note.

(g) Jacob, 56.

(h) This was a case under the fifth section of the act 6 G. IV, c. 74.

(i) We cannot find this case of *King v. Turner* in any of the reports, and shall present the reader with a note of the case, with which we have been supplied.

Joseph Green, being seised in fee of a copyhold, died intestate, leaving Mary Green, his widow, and George Green, his customary heir. Mary Green was admitted to her free bench. By indenture, dated 20th June, 1814, Mary Green and George Green covenanted with certain trustees, that he, George Green, would be admitted tenant, and that immediately afterwards the said George Green and Mary Green would surrender the premises unto the trustees, their heirs and assigns, or to such person as they should direct, upon trust; that the trustees should sell the

without having surrendered; and the question was, whether the infant *heir could convey? The Vice-Chancellor [*11] was of opinion, that the infant was not a trustee within the act, the trust being a constructive one, and he dismissed the vendor's bill with costs.

THE MASTER OF THE ROLLS:—Are there not many cases deciding that the acts do not apply to constructive trusts?

Mr. Wright:—That the statute of Anne does not.

THE MASTER OF THE ROLLS:—And in what respect does the 6 G. IV, vary it? His Honor considered this case to be not within the statute 6 G. IV, c. 74, and dismissed the petition.

same, pay 700*l.* unto Mary Green for her life interest, and divide the residue amongst the creditors.

The said George Green made his will, dated 8th May, 1818, in the following words: "Whereas, being entitled to the copyhold messuage, farm and land called the Hoe Land and Hoe Green, upon which I now reside, subject to the life interest therein of my mother, I some time ago covenanted to surrender the same to trustees for the benefit of my creditors, on the condition that the sum of 700*l.* was to be secured to me by the bond of the trustees therein mentioned, the interest whereof, during my mother's life, was to be paid to her. I give and devise all the said copyhold messuage, farm and land, with the appurtenances, called Hoe Land and Hoe Green, unto my friend, John Salter, his heirs and assigns, upon trust; and I declare and direct, that it shall and may be lawful to and for the said John Salter, his heirs and assigns, for the purpose of carrying my said contract into effect, at the request, costs and charges of the said trustees, to enter into and execute all necessary contracts, agreements, appointments, surrenders and assignments of the same premises to them, the said trustees, or as they shall direct; and to take and accept, in the joint names of himself and Peter Martin, the security of the said trustees for the sum of 700*l.* and interest;" and he disposed of the said sum and the residue of his real and personal estate upon the trusts therein mentioned. George Green, shortly after the date of his will, *died without having been admitted tenant* to the copyhold premises in question, leaving Jane Watts Green, an infant, his customary heir, and his will has since been duly proved. John Salter duly made and published his last will and testament, dated 2d November, 1819, but did not thereby affect the said moiety of the said copyhold premises; he died, leaving Henry Salter, his younger son and heir, according to the custom of the said manor of Bury.

The Vice-Chancellor held, that the legal estate of the premises in question was vested in the infant defendant, Jane Watts Green, and that she was not within the statute 6 G. IV.

 1829.—*Woolley v. Gordon.*

JAMES WOOLLEY AND OTHERS, ON BEHALF OF THEMSELVES
AND ALL OTHER THE CREDITORS OF CHARLES PERKS, DE-
CEASED, *Plaintiffs*; AND JOHN GORDON, ISAAC NEWTON AND
SEVERAL OTHERS, *Defendants*.

Partnership Accounts.—Practice.

WESTMINSTER HALL.—1829: 26th June.

Although a decree direct that all accounts be taken, the master will not take the accounts of a partnership, unless especially directed so to do.

THIS was a petition by the defendant, Isaac Newton, and stated, that in the year 1806, the testator proposed that [*12] the petitioner should commence business *with him in the trade or business of buckle manufacturers, and they were to be equally interested in the profits. Charles Perks died in July, 1819, having previously made his will, bearing date the 20th July, 1816, but he did not thereby appoint any executor, and administration with the will annexed, was granted to defendant, Gordon. In the month of June, 1820, the bill in this suit was filed, praying the usual accounts of personal estate, and that the freehold estates of the testator might, as well by force of the provisions of the will as by the statute, be declared assets to be administered by this court in payment of the testator's debts, whether simple contract or specialty; and for marshalling the assets, the usual decree followed. And the petition further stated, that the testator was cashier of the partnership; and that, upon investigating the accounts, upwards of 5,000*l.* appeared to be due to the petitioner on account of the partnership; and that the petitioner had carried in a charge before the master, as well for that sum as for a further sum of 300*l.* for goods sold and delivered by him to the testator; but the master refused to allow the claim, on the ground that he was not directed by the decree to inquire into the fact, whether the petitioner was or was not a partner with the testator, or to take an account of any such partnership. The petitioner further stated, that the partnership accounts could not be taken under the decree. It was prayed his Honor would order and decree, that the accounts of the partner-

ship might be taken by the master. This petition was supported by affidavits of the facts therein stated, and it appeared by the affidavits and admissions in the arguments, that this cause had, in its early stages, been conducted by the same solicitors for all parties. And the petitioner complained that his claim had been disallowed by an apparent assent on his part which he never authorized.

**Mr. Bickersteth* and *Mr. K. Parker* in support of the [*18] petition :—The petitioner was entirely ignorant of what had been going on in the master's office; and the only question is, whether there has been such *laches* on the part of the petitioner as will affect him? There can be no doubt that he was a partner with the testator up to the time of his death.

Mr. Pepys and *Mr. Hindes* against the petition.

THE MASTER OF THE ROLLS :—The answer of this petitioner, with that of the many other defendants in this suit, was put in without oath. Is it possible to conclude a person under the circumstances of this case? It is a misfortune flowing from the same solicitor being employed by all parties. I will not conclude him, who has been very ill treated. The masters have made a rule not to take an account of a partnership unless they are particularly directed to take the partnership accounts. Yet they are hardly warranted in making that rule, the order being to take all accounts.

Let it be referred to the master to inquire whether at any time and when the petitioner was a partner with the testator; and if he shall find him to have been a partner, then to take the accounts of the partnership; the accounts to be confined to the business of buckle making, the petitioner to pay the costs of the petition, and to take the inquiry at his own expense.(1)

[1] The Court of Chancery has a concurrent jurisdiction, in all matters of account, with the courts of law. *Post et al. v. Kimberly et al.*, 9 Johns. Rep. 470; *Ludlow v. Simond*, 2 Caines' Cas. 1, 38, 52; *Duncan v. Lyon*, 3 Johns. Ch. Rep. 351, 360; *Martin v. Spier*, 1 Haywood, 371. This jurisdiction was originally assumed upon the ground that the remedy at law was doubtful or incomplete. *Ludlow v. Simond*, 2 Caines' Cas. 39, 58; *Rathbone v. Warren*, on appeal, 10 Johns. Rep. 587, 595. A

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court of equity has jurisdiction in cases of long and complicated accounts between different persons, without bringing whom before the court, complete justice cannot be done. *Hunter's ex'rs v. Spotswood*, 1 Wash. 146. A series of consignments on one side and of payments on the other, gives jurisdiction to a court of equity for an account, although one transaction would not be sufficient. *McLin v. McNamara*, 2 Dev. & Batt. Rep. 83. The Court of Chancery, having acquired cognizance of a suit, for the purpose of discovery or injunction, will, in most cases of account, whenever it is in full possession of the merits, and has sufficient materials before it, retain the suit, in order to do complete justice between the parties, and to prevent useless litigation and expense. *Armstrong & Barnwall v. Gilchrist*, 2 Johns. Cas. 424, 431; *Rathbone v. Warren*, on appeal, 10 Johns. Rep. 599. The plaintiff may come into Chancery not only to compel the defendant to account but to have his own account allowed. *Ludlow v. Simond*, 2 Caines' Cas. 1, 39, 52, 53. The true meaning of account, which will give a court of equity jurisdiction. It is not to be taken in that large and comprehensive sense given to the word "account" in common parlance. *Smith v. Marks*, 2 Randolph, 449. Although the line may not be drawn with absolute precision, yet it may be safely affirmed that a court of Chancery cannot draw to itself every transaction between individuals in which an account between parties is to be adjusted. In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted. It is the appropriate tribunal. *Fowle v. Laurason's Executor*, 6 Peters, 495; *Hunter's Executors v. Spotswood*, 1 Wash. 145. The jurisdiction of the Court of Chancery in matters of account has been gradually enlarged, until it has become concurrent with that of common law courts, to an almost unlimited extent; where there are mutual dealings of parties—even when those dealings consist of items of a purely legal character. *Cummings v. White et al.*, 4 Blackf. 356. Courts of equity, however, have no jurisdiction over accounts where there is but one item on one side, or where there is no mutuality of dealing and a discovery is not required. *Ib.*; *S. P.* 10 Yerg. 179. But in matters of account which are mutual and complicated, or where a discovery is required, or a multiplicity of suits will be avoided, or the remedy at law is not full and adequate, or fraud, or accident, or mistake is connected with the subject, courts of equity have jurisdiction. *Ib.* To sustain a bill for an account there must be mutual demands, or a series of transactions on one side and of payments on the other. *Porter v. Spencer*, 2 Johns. Ch. Rep. 171. Chancery and law have concurrent jurisdiction of accounts; but the former has no jurisdiction where the parties have settled them and struck a balance. *Breckenridge v. Brooks*, 2 A. K. Marsh. 338. Courts of equity have jurisdiction concurrently with courts of law of matters of account; and a party does not lose his right to be heard in equity, in such case, by being sued and submitting to a judgment without defence at law. *Power v. Reeder*, 9 Dana, 10. Courts of equity have jurisdiction of all matters of account. *McKim v. Odom*, 3 Fairfield, 94. Where, to determine the liability of parties, it is necessary to require the accounts of several estates, it would seem that the Court of Chancery alone has jurisdiction. *Foster v. Wilber*, 1 Paige, 537. A suit in Chancery lies for an account of mesne profits after a recovery in ejectment, if the bill claims a discovery and shows a right to it. *Elliott et al. v. Armstrong*, 4 Blackf. 421. In all cases of account, where the remedy of the plaintiff would not

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be as adequate and complete in a court of law as in a court of equity, either from the defect of proof or other impediment, or for the purpose of avoiding a multiplicity of suits, the jurisdiction of the latter court attaches. *McLaren v. Steapp*, 1 Kelly's Rep. 376. If it is necessary for the plaintiff to search the conscience of the defendant, in order to establish his account, he may go into a court of equity for the discovery, in the first instance, and the court will not only give him the discovery, but will (on a proper prayer for the purpose) proceed to decree to him the appropriate relief consequent upon that discovery. 1b. A court of equity will decree a defendant to account for money over paid, in pursuance of a usurious contract. *McLaren v. Steapp*, 1 Kelly's Rep. 376. A complex and intricate account is an unfit subject for examination in a court, and ought always to be referred to a commissioner, to be examined by him and reported, in order to a final decree. To such report the parties may take any exceptions, and thus bring any question they may think proper before the court. *Dubourg de St. Colombe's Heirs v. The United States*, 6 Peter's Rep. 625. It is not the province of a court of Chancery to investigate items of an account, but they will be referred to a master, and the report of the master will be received as true, where no exception has been taken; and the exceptions are to be regarded, so far only as they are supported by the special statements of the master, or by evidence which ought to be brought before the court by a reference to the particular testimony on which the exception relies. *Harding v. Handy*, 11 Wheat. 103; 6 Cond Rep. 236. The claim to an account of assets will not give equity jurisdiction, unless it can pronounce a final decree in the suit in which the account is sought. The consent of two of the parties cannot give jurisdiction, where the objection appears on the face of the bill, and there are many other parties. *Randolph v. Kinney*, 3 Rand. 394. A court of equity has jurisdiction to decree an account and distribution, according to the *lex domicilii*, of the estate of a deceased person domiciled abroad, which has been collected under an administration granted here. But whether it will proceed to decree such account and distribution, or direct such assets to be remitted to be distributed by a foreign tribunal, depends upon the circumstances of the case. *Harvey v. Richards*, 1 Mason, 381. A widow dissents from her husband's will, and claims a distributive share of the crops growing on lands devised. She files a bill in equity against the executor, for an account of the crops and distribution of them, but charges no fraud, &c. Bill dismissed on the ground that a court of equity has no original jurisdiction over the case. *Jones v. Jones' Executors*, 1 Murphy, 96; *West v. Devises of Hatch*, 4 Murphy, 148. Where executors have delayed to apply to the County Court, to appoint commissioners to settle their accounts, until after the commencement of a suit in Chancery by the devisees, the Court of Chancery has acquired jurisdiction, and the matter ought to be investigated there. *Saunders' Heirs v. Saunders' Executors*, 2 Litt. 314. A controversy between a co-partnership and one of the partners, in regard to such partner's private account with the firm, is within the equity jurisdiction conferred on this court by statute 1823, ch. 140, "in disputes between co-partners, in cases where there is no adequate remedy at law." In all cases where an account is to be stated between partners, this court has equity jurisdiction under this statute. *Miller v. Lord*, 11 Pick. 11. A rough statement, in writing, exhibiting an estimate of the condition of a co-partnership, and the situation of the co-partners in relation to the co-partnership and to each other, will not support

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the plea of a stated account by one of the co-partners, in bar of a bill for an account filed by the executor of the co-partner, by whom the statement was prepared. But the deceased co-partner, having acquiesced in the statement for ten years, and set up no claim against his co-partner for an account of the co-partnership, but, on the contrary, at various times, acknowledged himself indebted to his co-partner, the court refused to order an account. Nor is an offer by the surviving co-partner to the executor of his deceased co-partner, to refer the matter to arbitration, nor a declaration that he was at all times ready to account, sufficient to deprive the former of the benefit of the Statute of Limitations, where there was no admission of indebtedness by him. *Burden v. McAlmoyle*, Bailey's Eq. Rep. 375. A court of Chancery may refer an account generally, or, on the return of the report, determine such questions as may be contested by the parties; or it may, in the first instance, decide any principle which the evidence in the cause may suggest, or all the principles on which the account is taken. *Field v. Holland*, 6 Cranch, 8; 2 Cond. Rep. 285.

[*14] *SIMON AND OTHERS v. BARBER AND OTHERS.

Legacies.—Substitution.—Charity; failure of its Object.—The Crown.

WESTMINSTER HALL—1829: 22d June.

A., by each of two several codicils to his will, directed his just debts to be paid, and, in particular, a debt of 12*l.*; by the one of them, he gave 100*l.* to a charity, and by the other, he gave 200*l.* to the same charity: held, that the legacies were not accumulative, and that the latter legacy was only a substitution of the former.

The charitable object having failed, the court will not apply the funds. Where a charitable object fails, from whatever cause, the crown has a right to interfere. The crown must signify the charitable purpose the fund shall be applied to.

THIS was the petition of three infants, defendants in this suit.

The testator, Edward Simon, made a will on the 16th day of December, 1789, and seven several codicils and testamentary papers thereto. By his fifth codicil, dated 27th May, 1805, he makes the following bequest: "My just debts to be paid, as may appear by my book, particularly one of about 12*l.* to one Tostevin of Guernsey, who had sent me a power of attorney to receive wages due to him from a man of war. I also wish that out of the first money that may be received from the stocks, that 50*l.* may be bought in my name in the 3 per cent. consols. I also

request that 100*l.* stock 3 per cent. consols may be transferred into the name of the trustees of the hospital at Guernsey; and, also, the same to be transferred in the name of the trustees of the hospital at Jersey." The sixth of the said codicils, bearing date the 5th day of June, 1805, was in the following words: "My just debts to be paid, as may be claimed, or as may appear by my book, particularly one of about 12*l.* to one Tostevin of Guernsey, who had sent me a power of attorney to receive some wages due from a man of war. I also give and bequeath unto the treasurer, governor, or directors of the Guernsey hospital for the time being the sum of 200*l.* stock 3 per cent. bank annuities, to be applied towards carrying on the charitable designs of the said corporation. I also give and *bequeath unto my [*15] nephew, George Le Bontillier, 1,500*l.*, stock 3 per cent. bank annuities, over and above the 500*l.* already bequeathed to him in my will or testament, now in the hands or possession of my daughter, Elizabeth Simon, making together the sum of 2,000*l.* stock, hoping thereby that he will exert himself in getting in my debts and settling my accounts as they should be."

By an order bearing date the 6th July, 1822, after directing the sale of some stock, it was ordered that out of the money to arise from such sale, the sum of 300*l.* should be carried over in trust in this cause, "The account of the Guernsey Hospital," and should be laid out in the purchase of bank 3 per cent. annuities, in the name and with the privity of the Accountant-General in trust in this cause, "the like account." And it was ordered that the dividends of the bank annuities to be purchased with the said sum of 300*l.* should be laid out in the purchase of like annuities, in the name of the said Accountant-General in trust in this cause, "The account of the Guernsey Hospital." The master reported, on the 11th March, 1828, that it had been stated to him, and verified by affidavit, that at the respective times of making the said codicils, and of the death of the said testator, there were two hospitals in the said island of Guernsey, one of which was situated in and supported by the town and parish of St. Peter's Port, and in which the poor of the said town and parish were placed, and was known by the name of "The Town Hospital;" and

the other of such hospitals was situate in the parish of St. Mary de Castro, in which the poor of that and the adjoining parishes were placed, being supported by them, and known by the name of "The Country Hospital." And further, that the said [*16] two hospitals had ever since continued, and were still *in existence, and were the only hospitals which existed at the respective times of making the said codicils, or which then existed in the said island of Guernsey. The master reported that he did not find that there was any establishment in the said island of Guernsey answering the description of the Guernsey Hospital.

A further reference was afterwards made to the master, to inquire and state to the court whether any and what particular hospital was meant or intended by the said testator by the description in his will, in the pleadings stated; and the master thereupon reported that he did not find that any particular hospital in the said island of Guernsey was meant or intended by the said testator, Edward Simon, by the description in the codicil to his will, and that report was absolutely confirmed.

Mr. *Roupell* for the petitioners, plaintiffs:—The first question on these testamentary papers in respect of the legacy to the Guernsey Hospital is, Whether the testator meant to give two legacies? namely, the legacy of 100*l.* by the fifth codicil, and 200*l.* by the sixth codicil, by way of accumulation, or whether the latter legacy was not meant in substitution of the former? Looking at those codicils altogether, it is clear that the testator meant only to give 200*l.* in the whole; there are several circumstances in these codicils that tend to show this to have been the testator's intention, and in particular that both the fifth and sixth codicils commence by providing for his just debts, and the payment of 12*l.* to one Tostevin of Guernsey. The second question was, What was to become of this legacy, there being no particular hospital called the Guernsey Hospital? Did it not fall into the residue for want of a proper object?

[*17] *Mr. *Wray*, for the Attorney-General, who had been served with the petition, submitted to the court that these

sums were accumulative, and cited the case of *Hurst and another v. Beach and others*,^(a) heard before his Honor, when Vice-Chancellor, when he said, "Where a testator leaves two testamentary instruments, and in both has given a legacy, *simpliciter*, to the same person, the court considering that he who has twice given must, *prima facie*, be intended to mean two gifts, awards to the legatee both legacies; and it is indifferent whether the second legacy is of the same amount, or less or larger than the first."

THE MASTER OF THE ROLLS:—There are circumstances sufficient to show that the sum given by the sixth codicil was not meant by the testator to be accumulative, but in substitution of that given by the fifth codicil: there being no hospital called "The Guernsey Hospital," the particular charitable object of the testator has failed: this court can give no direction for the application of the fund, but it remains with the crown to signify to what charitable purposes this fund shall be applied. Whenever a charitable object fails, from whatever cause, the crown has a right to interfere.

(a) 5 Mad. 358.

*BASS v. RUSSELL, WIFE AND OTHERS. [*18]

Will.—Construction.—Vested Interest.

WESTMINSTER HALL.—1829: 10th July.

A testator gave to his wife an annuity, and 100*l.* a year for each of his three children during their minorities; and from and after the decease or marriage of his wife, then the 300*l.* to be divided amongst his said children, in like manner as his other effects; and subject thereto he bequeathed his leasehold and personalty unto his three children, and the survivors and survivor of them. One of them died under twenty-one: held, that he took a vested interest at the time of the death of the testator.

EDWARD HAWTHORN, by his will dated the 31st of July, 1816, gave and bequeathed his leasehold houses, and all other his personal estate and effects, unto his executors, upon trust, out of the

rents, interest and annual proceeds thereof, to pay unto his wife, Elizabeth, the sum of 300*l.* per annum, and the sum of 100*l.* per annum for each of his children, which was to be paid to her during their respective minorities, for their support and maintenance; and from and after the decease or marriage of his said wife, then the said sum of 300*l.* was to go and be divided amongst his children, in like manner as the other part of his estate and effects was thereafter by him given to them, and thereafter mentioned; and, subject as aforesaid, he gave and bequeathed his said leasehold houses, and all other his personal estate and effects, unto his three children, Harriet Hawthorn, Margaret Hawthorn and Edward Hawthorn, meaning Edward B. Thomas Hawthorn, and the survivors and survivor of them, share and share alike: and he declared it to be his will, that the provision thereby made to his daughters was for their sole use, independent of any husbands they might marry. And he appointed his wife, and Wm. Barron, Esquire, and James Thomas, executors, who duly proved the will.

Elizabeth Hawthorn, the widow, died.

E. B. T. Hawthorn, having survived the testator, died in the year 1824, under the age of twenty-one years, unmarried [*19] and intestate, leaving his sisters of the whole *blood, Harriet and Margaret, him surviving; and the plaintiff and the defendant, Sarah Russel, his brother and sister of the half-blood, his only next of kin, him surviving.

Letters of administration to the effects of the intestate were granted to Sarah Russel, with the assent of the defendant, George Russel, her husband.

The plaintiff's bill charged, that the intestate, upon the death of the testator, became entitled to a vested interest in the one third part of such residuary estate, and which, upon the death of the intestate, became divisible among his next of kin. The case made by the answers of the sisters of the whole blood was, that, on the death of the intestate, his one-third of the residuary personal estate devolved to and became divisible between them.

 1829.—Capper v. Spottiswoode.

Mr. Roupell and *Mr. Pemberton* for the plaintiff:—There is nothing in this will to postpone the vesting beyond the time of the death of the testator. By the last clause of the will, two of the children, being daughters, were to have their shares for their separate use; and it is inconsistent with that provision that the vesting should be postponed.

Mr. Pepys and *Mr. Elliston* for the two sisters of the whole blood. The testator having provided for the three children during their minorities, he gave his property to his children, and the survivors and survivor of them; that is to say, to those who should be then in existence after their minorities had passed, thereby postponing the vesting until the children should attain twenty-one. They cited *Russell v. Long*,^(a) *Mendes v. Mendes*.^(b)

**Mr. Jemmett*, for another defendant, cited *Cuffs v. Woolcott*.^(c) [*20]

THE MASTER OF THE ROLLS:—This is a gift that must necessarily take effect at the death of the testator; and the words, survivors and survivor of them, must be referred to the time at which they are to take—the death of the testator.

Declare that the intestate, E. B. T. Hawthorn, took a vested interest in one third part or share of the residuary estate of the testator.

(a) 4 Ven. 551.

(b) 3 Atk. 619. And see *Roebuck v. Dean*, 2 Ven. jun. 265.

(c) 4 Madd. 11.

*CAPPER v. SPOTTISWOODE AND OTHERS, ASSIGNEES. [*21]

Lien.—Vendor and Purchaser.

WESTMINSTER HALL.—1829: 10th July.

A vendor who has taken, as a security for part of the purchase money, the bond of the vendees and a mortgage of part of the property sold, cannot, on the bankruptcy of the vendees, establish a lien on the entire estate.

1829.—Simon v. Barber.

THE plaintiff sold to Thomas Hurst, John Hurst and Joseph Ogle Robinson, the fee simple of lands in Yorkshire for 34,000*l.*, and conveyed the same accordingly by indentures of lease and release, bearing date 18th and 19th of July, 1825.

Only 12,000*l.* of the purchase money was paid; the remainder was secured by the bond of the purchasers, dated 20th of July, 1825, and a reconveyance, dated 19th and 20th of July, 1825, of certain parts of the purchased property by way of mortgage.

The purchasers afterwards became bankrupt, and the plaintiff alleged, that the part of the lands in mortgage were an inadequate security; and the short point in this case was, whether the plaintiff was entitled to a lien on the whole estate.

The MASTER OF THE ROLLS decided that he was not entitled to it.

[*22] *SIMON ET UX AND OTHERS v. BARBER AND OTHERS.

Infants.—Maintenance.—Practice.

WESTMINSTER HALL.—1829: 22d June.

The father of infants had maintained and educated them since the death of their mother, when they became entitled to a sum of money in this court. The father petitioned for a reference to the master on the subject of maintenance and education of the children, and for an allowance, as well for the time past as in future; but the court refused to make any reference to the master with respect to the maintenance of the infants in the time past, but made the usual reference with respect to their future maintenance out of the funds, in case the father was not himself of ability to maintain them.

THIS was the petition of Robert Dodgson, one of the plaintiffs, setting forth an order, bearing date the 26th July, 1822, whereby it was declared that Elizabeth Dodgson, the deceased wife of the petitioner, was entitled for life to the interest of a moiety of 2,000*l.* and of the clear residue of the testator's estate; and that

her issue would become entitled to the capital thereof on her death; and that 2,000*l.* should be carried to the account of the plaintiff, Elizabeth Dodgson, to be laid out, and the same was laid out in the purchase of 2,523*l.* 13*s.* 3*d.* 3 per cent. bank annuities. There were other residuary funds. Elizabeth Dodgson died in April, 1823, leaving three children, who were defendants to the suit, and on her death became entitled. The dividends had been laid out in the purchase of stock.

The petitioner stated circumstances of inability to continue to maintain and educate his children, and that he had been at a great expense in educating and maintaining them since the death of his wife. The prayer was for a reference to the master, to inquire into the petitioner's ability to maintain and educate the children; and if the master should find that the petitioner had not been of ability since the year 1825, then that the master should inquire and report who had maintained and educated them; and what had been properly expended or ought to be allowed on that account; and out of what funds or fund the same ought to be paid. And in case the master should find the petitioner not to be *now of ability to [*23] maintain and educate his said infant children, then that he should consider and report what would be proper to allow for their future maintenance and education, regard being had to their fortune and circumstances, and also out of what funds.

Mr. *Roupell* for the petitioner.

Mr. *Richards* for the infants.

THE MASTER OF THE ROLLS:—It is not usual to make any reference on the subject of maintenance retrospectively. Take the order with respect to future maintenance.

1829.—Monk v. Mawdsley.

SAINT JOHN v. CHAMPNEY, BART. AND OTHERS.—SAME v.
STIRLING, BART. AND DANCE.

Practice.

WESTMINSTER HALL.—1829: 26th June.

THE court refused to allow a petition to be amended by substituting another person for the petitioners, who, on the hearing of the petition, appeared to have no title.

[*24] *BETWEEN WILLIAM MONK AND ESTHER HIS WIFE,
WILLIAM HUTCHINSON AND ANN HIS WIFE, *Plaintiff*;
AND PETER MAWDSLEY AND ARCHIBALD KEIGHTLEY, *Defendants*.

Will.—Construction.—Devise.—Estate for Life.

WESTMINSTER HALL.—1829: 23d June.

A., a married woman, having, by virtue of her marriage settlement, power to appoint her personalty and a freehold to such person as she should direct, with remainder to a trustee to sell, and distribute amongst her next of kin, gave, devised and bequeathed to her husband the freehold, by the description of her two fields and house; likewise the remainder of her personalty, and all she might die possessed of at the time of her death, after certain previous bequests and her just debts were discharged, and appointed him and another executors: held, that the husband took only an estate for life, and that the next of kin were entitled to the moneys to arise by a sale of the reversion.

ARABELLA MAWDSLEY, by her marriage settlement with Peter Mawdsley, conveyed and assured a messuage, land and hereditaments in Great Neston, of which she was seised in fee simple, unto and to the use of the defendant, Archibald Keightley, his heirs and assigns, and assigned unto him, his executors, administrators and assigns, certain leasehold premises, and also all her bonds and other securities for money; and also all and singular her household goods, plate, linen, china and furniture, and all other her personal estate and effects. Then follow trusts for the

separate use of the settler during her life ; and as to the freehold messuage, land and premises, from and after her decease, to the use of such person and persons, and for such estate and estates, uses, ends, intents and purposes as she, notwithstanding her intended coverture, and whether she should be sole or covert, by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, to be by her signed, sealed and published in the presence of two or more credible witnesses, should appoint ; and in default *of such appointment, to the sole and absolute use of [*25] Archibald Keightley, his heirs and assigns forever, upon trust to sell the same ; and as to the money to arise from such sale or sales, upon trust to pay, distribute and divide the same unto and equally amongst such of her children as therein mentioned ; but if there should be no children or child of the said Arabella, then upon trust to distribute the same in a due course of administration amongst her next of kin, in such manner as her personal estate would be distributable if she should happen to die a *feme sole*, and should not make any testamentary disposition of her personal estate. Arabella Mawdsley died without children, having made her will in writing bearing date 20th April, 1824, and executed by her in the presence of and attested by three credible witnesses in the words or to the effect following : —“ In the name of God. Amen. I, Arabella Mawdsley, wife of Peter Mawdsley of Moorside, in the county of Chester, do make this my last will and testament in manner and form following, having full disposing power by settlement made at my marriage with the above Peter Mawdsley, now in the hands of Mr. A. Keightley, senior, solicitor, Liverpool, and my trustee.” The testatrix gave several legacies ; and the will then proceeds thus : “ I give, bequeath and devise to my husband, Peter Mawdsley, my two fields and house in the township of Great Neston ; likewise the remainder of my personalty, and all I may die possessed of at the time of my death, after the above bequests are fully discharged, my just debts paid, funeral expenses, and proving this my last will and testament. I nominate and appoint Mr. A. Keightley and my husband, Peter Mawdsley, trustees and execu-

*PURDIE v. MILLETT AND OTHERS.**Inadequacy of Consideration.*

WESTMINSTER HALL.—1829: 6th July.

A. having deposited leases with B. to secure moneys borrowed at different times from 1805 to 1813, in the latter year signed an agreement, giving up all his interest to the mortgagee; it was proved that the sum due to the mortgagee was a very inadequate consideration.

On a bill to redeem, and that the agreement should stand only as a security: Held, that the plaintiff was not entitled to relief in equity, and bill dismissed.

In the years 1805 and 1806, William Millett, deceased, the defendant's testator, lent to plaintiff 213*l.*, and plaintiff deposited with him a lease for twenty-one years from 1797, of five houses, which produced a net rental of 84*l.* On a further advance of 62*l.*, making with the former loan 275*l.*, the plaintiff deposited with him an agreement in writing, for a lease for twenty-one years, from Christmas, 1810, of five other houses, which produced the further clear rent of 86*l.* In June, 1813, there [*29] was a further advance of 72*l.* on a promissory *note, and in August the further sum of 44*l.* on a promissory note; and, at the time of each of these advances, the plaintiff agreed that the sums advanced should be secured by the deposit of the lease and agreement.

The deceased entered into the receipt of the rents in 1813. The lease of the more valuable part of the property expired in 1818.

There were various charges in the bill, to impugn an agreement for the equity of redemption of the property set up by the defendants, and the bill prayed that the agreement might be declared void or stand only as security; that the accounts might be taken; and that the plaintiff might redeem.

The defendants, by their answer, set forth an account and some promissory notes, found amongst the papers of the testator; and

1829.—Purdie v. Millett.

also an agreement, in writing, signed by the plaintiff, and which was in the words and figures following; viz.

"London, 18th February, 1815.

"Memorandum.—I, the undersigned, Richard Purdie, in consideration of moneys due from me to Mr. William Millett, of Burdett Place, in the Kent road, in the county of Surrey, gentleman, do hereby agree to give up all my interest in my ten houses, situate in Kingsland Road, Shoreditch; and of which houses the said William Millett is now in receipt of the rents.

"RICHARD PURDIE."

"Witness, JAMES PEARCE,

"13 Paternoster Row."

And defendants said they believed that the deceased became entitled to the premises by the said purchase; and they admitted it to be true, that the rents and moneys *so re- [*30] ceived, in case the same had been applied thereto, would long since have been sufficient to pay and satisfy the alleged principal sum of 275*l.* and all interest due thereon; but defendants denied, to the best of their knowledge and belief, that the said rents and moneys ought to be so applied; and defendants believed, that if such sum of 275*l.* and interest were due to the said William Millett, the same were long previously to his death liquidated and discharged by means of such purchase of the said premises, and not by means of the rents and profits received by the said William Millett, as in the bill alleged.

The defendants submitted, that the plaintiff was bound to execute an assignment: they denied fraud in obtaining the agreement; denied that 275*l.* was the only consideration; but defendants believed that all the moneys then due from the plaintiff to the deceased were the consideration of the agreement.

There was some slight parol evidence to show that, by the agreement, security only was intended; but the solicitor of the mortgagee, who drew the agreement, and who was present at its execution, denied that anything passed thereat to qualify it; and

swore, to his belief, that he had no reason for supposing the parties did not understand the purport and effect thereof. There was evidence of the value of the property, and which showed the inadequacy of the consideration.

Mr. *Pepys* and Mr. *Girdlestone*, jun :—The object of this bill is to obtain an account, to redeem the interest remaining in the leaseholds, and to make void an agreement set up by the defendants, for giving up the equity of redemption. At the time it is pretended that this agreement was executed, there was [*31] about 100*l.* per *annum applicable to the payment of the principal, and only 200*l.* then remained due; yet by this agreement the plaintiff simply, and for nothing, releases his equity of redemption. The plaintiff was receiving parochial relief, and the agreement was prepared by a person employed by the mortgagee. Fraud was originally intended, and a fraudulent use has been made of the agreement.

Mr. *Norton* for the defendant.

The MASTER OF THE ROLLS could not discover any principle upon which the court could give the relief prayed by the bill. The consideration was not adequate to the value of the property, but the court would not, on that ground, set aside this agreement. It was also proved that the plaintiff was in distress; but no advantage was taken of that circumstance, for no money was advanced at the time of signing the agreement: the paper was remarkably short; and the terms were so simple and explicit, that the plaintiff could not have misunderstood them. The agreement was unnecessary as a mortgage security, for the mortgagee had already a deposit of the leases, and was in receipt of the rents. The case was one in which the court could not interfere.

Bill dismissed with costs.

1829.—Denyer v. Druce.

*BETWEEN JAMES RICHARD DENYER AND OTHERS, AND [*32]
CHARLES DENYER WRIGHT AND OTHERS, INFANTS,
BY THEIR NEXT FRIEND, *Plaintiffs*; AND CHARLES DRUCE,
THE ELDER, AND OTHERS; THE MAYOR, COMMONALTY AND
CITIZENS OF THE CITY OF LONDON; THE CHANCELLOR,
MASTERS AND SCHOLARS OF THE UNIVERSITY OF OXFORD;
AND SIR JOHN SINGLETON COPLEY, KNT., HIS MAJESTY'S
ATTORNEY-GENERAL, *Defendants*.

Charities.—Costs.—Trustees.—Identity.—The Crown.

WESTMINSTER HALL.—1829: 6th July.

A., by her will, gave 7,000*l.* to the governors of Christ's Hospital, upon trust, for certain specific charities, and to pay certain annuities, and to apply 40*l.* per annum to the scholars of Christ's Hospital.

In case the governors refused to accept the trust, then the 7,000*l.* was given to the trustees of the Rev. William Hetherington's charity, for the like trusts, except as to the 40*l.* per annum, which was to be applied to the purposes of the latter charity.

The testatrix also gave 2,000*l.* to the University of Oxford.

The governors and trustees refused to accept these trusts, and the legacy of 40*l.* per annum.

The university also refused to accept the legacy of 2,000*l.*

Held, that whenever a charitable legacy, from whatever cause, fail, the crown has a right to interfere, and that the legacies of 2,000*l.* and 40*l.* per annum must be applied to such charitable purposes as the crown shall direct.

Held, that as to the 7,000*l.*, a reference be made to the master to appoint new trustees.

The bill dismissed, as against the governors, trustees and university.

When there is a doubt about the identity of a legatee, the court will direct an inquiry at the expense of the person requiring it.

ELIZABETH DENNIS DENYER made her will, bearing date the 16th August, 1821, and thereof nominated and appointed Charles Druce, the elder, William Tebbs and Benjamin Shaw executors in trust; and after bequeathing a great many legacies of money and stock, all of which have been paid or provided for, the testatrix gave and bequeathed as follows: "I give and bequeath to the governors of the revenues and possessions of the hospital *called "Christ's Hospital," in London, the princi- [*33]
pal sum of 7,000*l.* stock in the consolidated 3 per cent.
annuities; and I direct my executors to transfer the same stock

1829.—*Denyer v. Druce.*

to the said governors accordingly, within six months after my decease. And I will and direct that the said governors shall stand possessed of the said sum of 7,000*l.* consolidated annuities, and the interest and dividends thereof, upon the trusts and for the purposes after mentioned;" which purposes were the payment of several annuities and many specific charities, and amongst them is the following: "And as a compliment to the said institution of Christ's Hospital, and by way of encouragement to learning, I will and direct that the said governors of Christ's Hospital for the time being, do and shall annually, and forever, retain, for the purposes after expressed, the annual sum of 40*l.*, other part of the dividends and interest of the said sum of 7,000*l.* consolidated annuities; and that they do and shall on or before the 5th of August in every year give the sum of 10*l.* each to three scholars of the said hospital, proficient" as therein mentioned. They were also directed to pay the sum of 30*l.* per annum, further part thereof, to Melino Garthwaite, spinster, (meaning, it is contended, Sarah Garthwaite, spinster,) for and during the term of her natural life. The will then proceeds as follows: "And it is my will that neither the principal, or interest, or dividends of the 7,000*l.* consolidated annuities shall ever be applied or liable to pay the expense of any law suit or litigation whatsoever. And in case the said governors of Christ's Hospital should refuse to take upon themselves the trust hereby reposed in them, but which I earnestly hope will not be the case, then and in such case I will that the said sum of 7,000*l.* consolidated annuities, shall be transferred to the trustees for the time being of the Rev. William Hetherington's Charity for the Blind, upon

[*34] *the several trusts and for the several purposes hereinbefore expressed, and in furtherance of the object of the same." [Except as to the said annual sum of 40*l.*, which was to be applied to the general purposes of Mr. Hetherington's charity.] "I give and bequeath to the Chancellor, masters and scholars of the University of Oxford for the time being, in their corporate capacity, the principal sum of 2,000*l.* stock in the consolidated 3 per cent. annuities. And I direct my executors to transfer the same stock to the said Chancellor, masters and scholars accordingly, within six months after my decease; and that they shall

stand possessed thereof and of the interest and dividends of the same upon the trusts and for the purposes after expressed," which were, to apply the dividends thereof in two prizes of 80*l.* each, to two members of the University of Oxford, as an honorary reward for the two best sermons as therein mentioned.

The testatrix then directed that all the remainder of her personal estate and effects, whatsoever and wheresoever, should be divided into five equal parts, which she gave and bequeathed as therein mentioned.

The testatrix died on the 6th of April, 1824; and soon after her death, Charles Druce, the elder, William Tebbs and Benjamin Shaw, the executors, proved her will and paid her debts.

The bill stated the preceding facts, and that, at the time the testatrix made her will, there was no person in existence of the name of Melino Garthwaite, but that the testatrix was acquainted with Sarah Garthwaite, who had a sister called Melino Garthwaite, who had been dead many years; and that the testatrix meant and intended to give to Sarah Garthwaite the legacy which *was by the will given to Melino Garthwaite; [*35] and that Sarah Garthwaite claimed to be entitled to such legacy. That the mayor, commonalty and citizens of the city of London were the governors of the possessions, revenues and goods of the hospitals of Edward, late king of England, the Sixth, of Christ, Bridewell and St. Thomas the Apostle, and were also trustees of Hetherington's fund for the blind, which was the charity meant and intended by the testatrix under the description of the Rev. William Hetherington's Charity for the Blind; and that the three executors, having possessed sufficient assets of the testatrix, were willing, and had offered to transfer to the mayor, commonalty and citizens of the city of London, as governors of Christ's Hospital, the sum of 7,000*l.* 3 per cent. consolidated bank annuities, which was given to them by the will; but that the mayor, commonalty and citizens, as such governors, as it was alleged, declined to accept the legacy on the trusts in the will mentioned; and that, upon their having so declined to accept the

legacy, the executors had offered to transfer the 7,000*l.* to the mayor, commonalty and citizens of the city of London, as trustees of Hetherington's fund for the blind; and that the mayor, commonalty and citizens again, as it was alleged, refused or declined to accept the legacy; and that, under such circumstances, the sum of 7,000*l.*, 3 per cent. consolidated bank annuities, remained standing in the books of the governor and company of the Bank of England, in the name of Elizabeth Dennis Denyer, deceased; and that the annuitants claimed to be interested therein in respect of the several annuities to them respectively given by the will, and thereby made payable out of the dividends and interest thereof; and that Sir John S. Copley, Knt., his Majesty's Attorney-General, claimed to be interested in the 7,000*l.*, 3 per cent. consolidated bank annuities, or the dividends and [*36] interest thereof, in *respect of the charitable purposes for which certain parts of such dividends and interest were by the will directed to be applied.

The bill also stated that the executors were ready to transfer the 2,000*l.* stock to the Chancellor, master and scholars of the University of Oxford, but they had declined to accept the same. The residuary legatee and the next of kin each claimed the 2,000*l.*, if refused by the university.

His Majesty's Attorney-General, in case the corporation of London refused to perform the trusts, claimed the 7,000*l.* for the purposes of the will, under the directions of the court.

The bill prayed the usual accounts; and, in case the corporation of London and the University of Oxford refused to accept all interest in the legacies bequeathed to them by the will, that the same legacies might be transferred into the name of the Accountant-General, to be dealt with as the court should direct. The corporation of London, by their answer, disclaimed the 7,000*l.*, both as trustees of Christ's Hospital and of Hetherington's fund, and the University of Oxford also declined to accept the legacy of 2,000*l.*

Dennis Wright, spinster, by her answer, submitted that these two sums had, by these refusals, sunk into the residuary estate.

The next of kin submitted that the legacy of 2,000*l.* was to be treated as not disposed of, and belonged to them.

Mr. Pepys and *Mr. K. S. Parker* for the plaintiffs.

**Mr. Barber* for the executors. [37]

Mr. Wray for the Attorney-General.

THE MASTER OF THE ROLLS:—I have lately decided that whenever a charitable legacy, from whatever cause, fails, the crown has a right to interfere. The legacy of 2,000*l.* and annual payment of 40*l.* have been refused by the charitable institutions on which the testatrix conferred them, and those bequests have consequently failed: it results that it rests with the crown to direct the charitable purposes to which they shall be applied.

With regard to the bequest of 7,000*l.*, the trustees named having refused to perform the duties prescribed by the will, the court will appoint other trustees, for which purpose a reference must be made to the master.

The 7,000*l.* and 2,000*l.* to be paid into court.

An inquiry may be made, who was the person intended by *Melino Garthwaite*, at the expense of the person requiring it.

The other necessary inquiries were directed, and the bill dismissed, as against the corporation of London and the University of Oxford.

Costs of all parties to be paid, but no costs to come out of the 7,000*l.*

[*38] *BETWEEN THOMAS ELWORTHY, WILLIAM ELWORTHY
AND MARY BIRD, *Plaintiffs*; AND WILLIAM BIRD, *De-*
fendant.

Legal Consideration.—Agreement of Counsel.—Evidence.—Specific Performance.

WESTMINSTER HALL.—1829: 7th July.

A husband being prosecuted and found guilty, at the Quarter Sessions, of an assault upon his wife, the court recommended an accommodation of the disputes and differences between them. The counsel of the parties signed a memorandum of agreement, that the husband should allow the wife an annuity of 50*l*, and the court, adverting to the arrangement, passed sentence upon the defendant, imposing only a nominal fine upon him. It was proved that the defendant's attorney stated publicly in court, that the defendant had come into the agreement, and that the defendant was in court when the arrangement was entered into. The defendant, by his answer, denied that he ever consented to it; and on his part there were depositions that to some extent supported it.

Held, that it was not incumbent on the plaintiffs to prove that the defendant did assent to an agreement entered into by his counsel, but on the defendant to disprove it.

Held, also, that the weight of the evidence being that the defendant did not dissent, a court will conclude a counsel had authority.

Held, that the plaintiffs were entitled to a decree for a specific performance, with costs.

THE bill stated the marriage of the plaintiff, Mary Bird, with William Bird, and various acts of ill usage by him, and indictments for assault, in which he was found guilty at the Midsummer Quarter Sessions, 1822, for the county of Somerset, when the justices recommended an accommodation of the disputes between the parties, and an agreement was come to by the counsel on their behalf and by their authority; and that the plaintiff would consent to the court imposing a nominal fine, as follows: "*Rex v. William Bird*: upon a verdict of guilty in this case, a nominal fine was by consent of prosecutrix imposed on defendant, 1822, July 18th; it being agreed that a deed of separation shall be executed by Mr. and Mrs. Bird, and Thomas Elworthy, the father of Mrs. Bird, and William Elworthy, her brother,
[*39] who shall be trustees on her behalf, *by which 50*l*. a year for her life, payable quarterly by said Mr. Bird, shall

be sufficiently secured to Mrs. Bird, to commence the first day of April, 1821; the arrears of which to be paid by said Mr. Bird; and also covenants on the part of Mr. Bird not to molest Mrs. Bird; and also covenants from Thomas Elworthy, the father of Mrs. Bird, and William Elworthy, the brother, to indemnify the defendant against the debts of Mrs. Bird; and that Mr. Bird shall not be molested by her. All actions and indictments which have been brought and preferred, and which are still pending, for any matter or thing done or said by Mr. and Mrs. Bird, or either of them, or by their respective relations and servants, or any or either of them, relating to or connected with the conduct either of Mr. or Mrs. Bird, and all actions now pending against any other person for criminal conversation with Mrs. Bird, shall be discontinued; and that no further actions shall be brought, or proceedings had, for or on account of anything done, or said, to or by the said Mr. or Mrs. Bird, or their respective families or servants, up to and including the date of this agreement. Thomas Erskine, counsel for the defendant; C. C. Bompas, counsel for the prosecutrix." The bill further stated, that the substance of the agreement was stated to or in the presence and hearing of the justices, who did not object thereto, but approved of the same, and consented thereto, and sanctioned the same; and in consequence thereof, they sentenced the defendant to a fine of one shilling only, and ordered the trials of the other indictments to be respited.

The bill then stated that the defendant had refused to execute the proper deed, or to pay the arrears, and that the plaintiffs had offered to give him the proper indemnity against the debts of Mary Bird. The prayer was for a specific performance.

*The defendant, by his answer, admitted that the counsel did enter into the agreement mentioned in the bill; but he denied that the agreement was come to with his authority or consent, he having positively refused to authorize his counsel or any other person to consent to the same, or any other agreement; and he submitted that he ought to be permitted to dispute the fact of his having assented to the agreement; and he further

submitted, that the agreement ought not to be specifically performed, because on the face of it such agreement was illegal, for divers causes thereon appearing, and was such an agreement as a court of equity ought not specifically to perform; but more particularly, because part of the consideration upon which the agreement was alleged to have been entered into was the compromising an indictment then already preferred against him by his wife, Mary Bird, for a misdemeanor, and suppressing other indictments and actions which had then been brought and preferred, and which were then pending, for matters and things done and said by him and the plaintiff, Mary Bird, and by their respective relations and servants, relating to and connected with the conduct of him and the plaintiff, Mary Bird, and other actions then pending against persons for criminal conversation with the plaintiff, Mary Bird; and further actions which might be brought, or proceedings had, on account of things done or said to or by him, the defendant, and the plaintiff, Mary Bird, and their respective families and servants, and also because the object of such alleged agreement was to effect a separation between him and the plaintiff, Mary Bird.

The depositions on the part of the plaintiff proved, that Mr. Poole, the defendant's solicitor, on the trial of the indictment, stood on the counsel table in court, and stated openly and [*41] audibly to the court, in allusion to *the arrangement, "We agree to it," or words to such or the like effect, and that the defendant was present in court when the verdict was returned; also when the treaty took place, and when Mr. Poole made the statement; that the counsel for the prosecution stated openly in court the terms of an arrangement, which were that the defendant, William Bird, should allow the plaintiff, Mary Bird, the sum of 50*l.* per annum, and that all pending actions on either side should cease; and that afterwards, Mr. Poole stood upon the counsel table and said, "Mr. Bird (meaning the defendant) accedes to it," or words to that effect, and that such statement, made by Mr. Poole, was made openly and audibly in court; that the defendant, William Bird, was present in court when the verdict was returned, but whether he was in court

when the whole conversation took place the deponent could not state, but the defendant was present in court when his attorney made the statement deposed to; that immediately after the arrangement had been made, the defendant left his seat below the magistrates' bench, and went to the opposite side of the counsel table, when the chairman addressed him by telling him, that as an arrangement had been come to, the court would only impose a nominal fine upon him, or words to that effect, and pronounced sentence, fining him one shilling.

And the chairman of the Quarter Sessions deposed, that the magistrates did believe that a treaty for a compromise was proceeding, and the court waited and suspended its business whilst the same was proceeding; and that Mr. Erskine, the defendant's counsel, openly and audibly stated to the court that a compromise or arrangement was agreed to; (that was to say,) as deponent best recollected, that the defendant was to allow his *wife 50*l.* a year, but that they were to live separate, and [*42] that the defendant agreed to such compromise or arrangement; that the defendant was present in court when the verdict was returned, and whilst the conversation and treaty took place; and when the statement was made by Mr. Erskine to the court, and from what passed on that occasion, deponent understood and believed that the defendant agreed to the compromise or arrangement; that sentence was passed or pronounced upon the defendant by the court, namely, that the defendant should pay a nominal fine, (as deponent best recollected, 1*s.*.) and which sentence was passed or pronounced immediately after the statement was so made by Mr. Erskine, and that the court approved of and sanctioned the compromise or arrangement; and the same was taken into consideration upon passing or pronouncing the sentence, and that the court made a common order for respiting the trials of some other indictments against the defendant for (as deponent best recollected) assaults, and which order was made in consequence of the compromise or arrangement having been agreed to; but whether such indictments were against other persons besides the defendant, William Bird, the deponent did not recollect.

On the part of the defendant, there were depositions by one person who stated himself to have been within hearing of what passed between the defendant and his attorney and counsel at the sessions, when the defendant positively stated that he would not allow his wife anything; and the attorney himself deposed, that the defendant refused to come into the arrangement; but he could not say whether the agreement was signed by the defendant's counsel with or without the authority, privity or consent of the defendant, or on his behalf.

[*43] *Mr. *Bickersteth* and Mr. *Jacob*, for the plaintiffs:—It is now determined that this is an agreement which the court will carry into execution. A demurrer to this bill has been overruled.^(a) The bench, at the Quarter Sessions, on the trial of the indictment, recommended a settlement of the disputes and differences between the parties. An arrangement was accordingly made and reduced into writing, and signed by counsel, and it is sworn that the defendant was present: we have only to prove that he consented. •

THE MASTER OF THE ROLLS:—You have not so much to do; for it being proved to have been signed by counsel on both sides, it is for the defendant to disprove it.

Mr. *Richards* for the defendant:—The defendant's answer and evidence show that he did refuse to enter into the terms of the compromise: there is evidence showing his positive dissent; and the plaintiff has not been able to read, out of the defendant's answer, any one sentence in support of the agreement.

Mr. *Knight* followed for the defendant:—I shall not question what your Honor has said with respect to the demurrer. On the demurrer, you, Sir, were called upon to decide, whether the court could entertain a suit to execute an agreement grounded on the consideration of a compromise of a misdemeanor; but now, at the hearing, the question is, whether this is an agreement fit to

(a) *Elworthy v. Bird*, 2 Sim. & Stu. 372.

be performed? Will the court interfere when the party has her remedy at law to recover her annuity? The defendant has signed nothing, but his counsel's signature is on the brief.

A party trusts *his counsel as to the particular cause in [*44] which the brief is delivered to him, but does not make him his agent for a purpose foreign to the cause. Agent is the language of the Statute of Frauds, and an annuity is an hereditament. Now, if such an annuity may be charged upon a person by an indorsement of counsel on his brief in the hurry of Quarter Sessions, he may equally make away with an estate of 4,000*l.* a year. A party trusts his counsel with the management of a particular cause, but not beyond it. But, supposing the agreement of a counsel sufficient to bind a party, it is, at least, doubtful whether the defendant concurred in this instance. The defendant denies that he did, and the attorney supporting him in that denial, the court will at least grant an issue.

THE MASTER OF THE ROLLS:—This is an agreement upon which no adequate remedy can be had at law; it cannot, therefore, be sent to law. The prior conduct of the party is out of the question. This agreement concludes the parties, and the only question is, whether the counsel had sufficient authority? In the absence of evidence, a court will conclude that he had authority; for it is not to be presumed that counsel would enter into an agreement without authority. There is, in this case, evidence on both sides; but after duly considering it, I come to the conclusion that counsel had authority which would bind his client. The defendant, it is true, objected when the arrangement was first proposed; but the question is, did he not afterwards, impressed with the weight of his counsel's reasoning, assent?

His counsel swears that such arrangement was concluded between the parties, and Mr. Bird was present. The chairman, in passing sentence, said, "I impose a *nominal fine [*45] upon you, because you have entered into the arrangement."

It necessarily follows, that the plaintiff is entitled to a decree for a specific performance, with costs.

1829.—*Spittal v. Smith.*

Let a proper deed be prepared, to be settled by the master according to the agreement.

BETWEEN JAMES SPITTAL, ON BEHALF OF HIMSELF AND ALL OTHER THE UNSATISFIED OFFICERS, SEAMEN AND CREW, IF ANY, ENGAGED ON BOARD THE SHIP ROYALIST, ON THE VOYAGE HEREINAFTER MENTIONED, WHO SHALL COME IN, &c. *Plaintiffs*; AND WILLIAM SMITH, *Defendant*.

Accounts.—Misrepresentation.

WESTMINSTER HALL.—1829: Wednesday, 1st July.

The defendant engaged the plaintiff as second mate of a vessel in the South Sea whale fishery, and the plaintiff was to have a forty-fifth share of the net produce. On the return of the ship, the defendant paid the plaintiff a sum of money, which he stated to be the forty-fifth share, after the customary deductions. No accounts were produced. The defendant afterwards discovered that several deductions had been made that were not authorized by the custom of the trade.

Inquiries directed, whether the deductions made were authorized by the custom of the trade.

Held, that the bill having been filed by the plaintiffs on behalf of himself and the others of the crew, and no case for equitable relief having been made as to the others of the crew, the bill, as to them to be dismissed.

THE defendant being the owner of the ship *Royalist*, which he was desirous of sending on a voyage to the South Seas, for the purpose of obtaining a cargo of oil and other articles, in the month of May, 1820, engaged the plaintiff as second mate thereof, representing to the plaintiff that he had already engaged a person as first or chief mate thereof; and the plaintiff accordingly, under the belief and assurance that some person would [*46] *go out with the ship as chief mate thereof, and that the plaintiff, having the remuneration of a second mate, would have to perform the duties of second mate only, accordingly engaged himself as second mate of the said ship for the said voyage. And thereupon it was agreed between the defendant and the plaintiff, that in lieu of wages the plaintiff should, according to the usage and custom of merchants and seamen en-

gag^{ed} in the South Sea voyages, be entitled unto and receive one equal forty-fifth part or share of the clear produce of the cargo which should be obtained on such voyage, remaining after the deduction of all usual and customary charges, deductions, and allowances. And accordingly certain articles of agreement to that effect, bearing date the 1st May, 1820, was prepared by or with the privity of the defendant, and were entered into and signed in London as well by or on the behalf of the defendant as by the plaintiff, and other the officers, seamen and crew engaged for the voyage, and which are termed the ship's articles.^(a)

The bill stated the preceding facts, and that upon the arrival of the ship at the port of London, the whole of the said cargo was possessed by the defendant; and the same having been previously sold by him, the purchase-money was shortly afterwards, and on the 27th of May, 1823, possessed and received by the defendant. And that prior thereto, on the 2d May, 1823, the defendant sent for the plaintiff to his counting-house, and informed him that he had finally settled the ship's accounts, and *that the charges and deductions to which, under the [*47] ship's articles, the gross proceeds of the cargo were subject, amounted to the sum of 3,616*l.* 14*s.* 5*d.*, and the plaintiff's share was 162*l.* 9*s.* 2*d.*; from which, after deducting the sum of 51*l.* 9*s.* 2*d.*, in respect of matters therein mentioned, there remained to be paid to the plaintiff the sum of 111*l.*; that the defendant desired him to accept that sum, and to sign a receipt for 162*l.* 9*s.* 2*d.*; but the defendant did not produce any account, receipt, or voucher, and the plaintiff, being much distressed; received the said sum of 111*l.*, and signed a receipt for 162*l.* 9*s.* 2*d.*

The bill charged, that a much greater sum was charged for casks and expenses than the defendant ought to have charged;

(a) The share of the chief mate was to be a twenty-eighth part. The person intended to fill that office did not go; and the plaintiff states in his bill that he did the duties of it, and claimed, in consequence, a twenty-eighth, instead of a forty-fifth share; however, in the course of the argument, this claim was abandoned by the plaintiff's counsel.

and particularly that the defendant had improperly included amongst the alleged, usual and customary charges and deductions, a sum of 1,419*l.* 12*s.*, as being the amount of the prices of 838 tons of casks, while, in fact, 247 tons of casks only were used for the purposes of the ship and cargo; that the defendant's charge for the casks of four guineas a ton exceeded the cost prices; and that he had also charged the sum of 248*l.* 8*s.* 6*d.*, for three and a half years' interest on the sum of 1,419*l.* 12*s.*, and had improperly charged insurance on both these sums, and 2 1-2 per cent. for brokerage, in addition to the 5 per cent. for commission; and the bill also charged, that the plaintiff was induced to receive the money paid to him, and to sign the receipt, under the pressure of immediate distress, and without the benefit of legal advice; and in consequence of the representation of the defendant, that he had fairly settled the ship's accounts, and ascertained the share of the plaintiff to be 162*l.* 9*s.* 2*d.*, and which representations plaintiff had since discovered to be false and fraudulent. And the bill prayed that the proper accounts [*48] might be taken, and the plaintiff and crew be paid their shares; and that, in taking the accounts, the defendant might be disallowed all payments made and claims set up by him, on account of any charges, deductions, or allowances which were not usual, customary or proper.

The defendant, by his answer, admitted that the plaintiff was engaged as second mate, and in lieu of wages was to have an equal forty-fifth share of the clear produce of the cargo, which should be obtained on such voyage after the deduction of all usual and customary charges and allowances. The defendant set forth the articles of agreement with the crew, by which the officers and seamen did promise and agree with the owner, that the price of casks should be four guineas for each ton with all other usual and customary charges, and 5 per cent. commission on amount of sales. And it was by such articles further promised and agreed by the parties thereto, that no officer or seaman should be entitled to his share until the amount of the cargo should be received by the owner or owners of the ship, (that is to say,) when they should receive possession.

1822.—*Spittal v. Smith.*

The defendant admitted that, under the said articles of agreement, the plaintiff sailed from London, and that the voyage was completed about the time in the bill mentioned. The defendant further admitted, that, according to the ship's articles, and to the course and custom of the trade in the South Sea whale fishery, and with the privity and approbation of the crew of the ship, the whole of the cargo was possessed by the defendant upon the arrival of the ship at the port of London; and that the same, in the proper, usual and ordinary course and mode of business in such cases, had been previously, and on the *9th [*49] November, 1822, duly sold; and that the purchase money, to the amount in the whole of 11,082*l.* 15*s.*, was, on the 27th May, 1823, duly, and in the ordinary course of business, received by the defendant. And the defendant denied that he did, shortly after the arrival of the ship, or at any time, send for the plaintiff to his counting-house, and inform him that he had finally settled the ship's accounts, and that the share to which the plaintiff was entitled of and in the clear produce of the cargo, after deducting therefrom the usual and customary charges, deductions and allowances on account of the cargo, amounted to the sum of 160*l.*, or any other sum; and that, after the deduction thereout of the moneys due from the plaintiff on account of advances made and slops supplied to the plaintiff or otherwise, the balance remaining to be paid to the plaintiff would amount to 111*l.* or any other sum. And the defendant denied that he required the plaintiff to accept 111*l.*, and to sign a receipt for the same, or otherwise; or that he refused, or was asked or requested, to produce any accounts, receipts, or vouchers to enable the plaintiff to ascertain the amount of the moneys which he claimed to deduct from the gross produce of the cargo, on account of the usual and customary charges, deductions and allowances chargeable against the cargo; or that defendant insisted that he had fairly settled and ascertained the amount of the plaintiff's share in the cargo; or that the plaintiff was much distressed for money after so long a voyage; or that he was unable to prevail with the defendant to come to any further account; or that, under the pressure of the said alleged circumstances, the plaintiff was

induced to accept, or did accept, the sum of 111*l.* or any other sum.

The answer further stated, that the plaintiff, being desirous to receive his money from the defendant before [*50] the oil was gauged, and before the regular and due time for payment thereof, requested the defendant to settle with the plaintiff, on the principle of considering the oil (the quantity of which, within seven or eight tons or less, could be and then was known) as being 230 tons of sperm oil, and ten tons of black oil. And the defendant did accordingly agree so to settle with the plaintiff; and that, thereupon, the defendant showed to the plaintiff the account sales of the oil, showing the sale and the price at which it had been sold as aforesaid; and he (defendant) then also told the plaintiff, in the presence of the surgeon of the ship, the amount of the charges and deductions to which, under the ship's articles, the gross proceeds of the cargo are subject, such amount being 3,616*l.* 14*s.* 5*d.*, with which the plaintiff expressed himself satisfied, nor did he ask for any further explanations or particulars respecting the same, which the defendant, if requested, was then prepared, and ready and willing, to give; that he paid plaintiff 151*l.* 5*s.* 11*d.*, which, with 11*l.* 8*s.* 6*d.* paid for him, made 162*l.* 9*s.* 5*d.*, and which, with 12*l.* previously paid in cash to the plaintiff, exceeded by several pounds his full share. That the plaintiff, thereupon, expressed himself perfectly satisfied; and, in the presence of the surgeon of the ship, signed and delivered to the defendant a receipt in full, as follows: "Received the 2d day of May, 1828, of Wm. Smith, the sum of 162*l.* 9*s.* 5*d.* for the ship *Royalist*, Captain Cook, on a voyage to the South Seas. I say in full of all demands against the said ship owner and captain. James Spittal, 162*l.* 9*s.* 2*d.* Witness, M. Gaunt."

The defendant admitted that he had charged the produce of the cargo with 338 tons of casks at four guineas per ton, and credited the cargo with thirty-six tons of casks, returned [*51] at the average valuation by *coopers on their arrival.

Amongst the charges set forth in the schedule were

338 tons of casks at 84s.	-	-	-	£1,419	12	0
3 1-2 years' interest thereon	-	-	-	248	8	6
				£1,668	0	6
Insurance on 1,668l. at 8l. 8s. per cent.	-	-	-	£140	0	0
Interest on premium	-	-	-	24	10	0

It was proven, by depositions on the part of the plaintiff, that about 257 tons of casks were used on board the ship during the voyage for the purposes of the cargo obtained on such voyage, and about ten or twelve tons of casks were also used for other purposes of the ship and voyage. And that it is usual and customary, amongst merchants and others engaged in the South Sea fisheries and trade, to debit the produce of the cargo obtained on any such voyage, and as part of the usual and customary charges and deductions, with the cost prices of such quantity of casks only as is actually used for the purposes of the voyage; and that it was not usual to debit the produce of the cargo with interest on the prices of the casks, or with the insurance of them.

On the part of the defendant there were depositions of the surgeon of the vessel, that he (the surgeon) was present on the 3d of June, 1823, when a settlement of accounts relating to the voyage took place; and that upon that occasion the defendant distinctly stated to the late plaintiff, and the other parties present, the amount they would each have to receive for their respective shares of the cargo; and explained, in a general way, that the cargo, at the market-price of the day, *was worth so [*52] much, and that the deductions and charges against the proceeds of the cargo amounted to so much; and that, in computing the amount of the share of the plaintiff and the rest of the crew, he (the defendant) had estimated the cargo at something above the market price of oil. That Humphries, the third mate, refused to take the sum offered him by the defendant as his share, but the plaintiff received the sum of 162l. 9s. 5d., as

1829.—*Spittal v. Smith.*

mate to be dismissed with costs, reserving the payment of costs and further directions.

The bill, also, to be dismissed as to the others of the crew.

[*55] *BETWEEN WILLIAM JOCKLE, MARINER, ON BEHALF OF HIMSELF, AND ALL THE OTHER UNSATISFIED OFFICERS AND MARINERS, AND PERSONS ENTITLED UNDER OR BY VIRTUE OF THE ARTICLES OF AGREEMENT, *Plaintiffs*; AND MATTHEW WHITING AND FRANCIS WHITING, *Defendants*.

Accounts.—Settlement.

WESTMINSTER HALL.—1829: 3d July.

The master of a vessel in the South Sea whale fishery, on behalf of his owners, agrees with the officers and crew, that each shall have a specified part of the net produce of the voyage. Shortly before the return of the vessel, the owners, who were entitled to a part of the net produce, sell a quarter of the cargo at 52l per ton, on their own account. The practice of the trade is, on the arrival of a vessel, to have the cargo estimated by a ship's cooper, and the price fixed at that given in the market on the arrival of the cargo. That mode was adopted in this case, and the plaintiff, being apprised of it, settled accordingly.

Held, that the owners had no right to sell a part of the cargo on their own account, they being only entitled to a share of the produce; but the plaintiff, having settled, was too late for relief in equity.

Held, also, that having settled upon the estimated quantity, although the cargo ultimately proved to amount to six additional tons, yet the plaintiff, having acted upon the estimate, he was not entitled to relief in equity.

THE defendants were joint owners of the ship *Elizabeth*; and, in August, 1820, were about to send her to the South Seas for spermaceti, whales, or other produce of the South Sea, under the command of John Samuel Parker.

Articles of agreement were entered into by and between Parker, as such captain, and as agent for and on the behalf of the defendants, and the officers, seamen and others, then on board the said ship, or who should thereafter enter on board the said

ship; including, in such description, John Inkley, as the chief mate, and the plaintiff as the then second mate of the said ship or vessel, whereby the said J. S. Parker, in his aforesaid capacity of agent for and on behalf of the defendants, bound or *obliged himself to pay, or cause to be paid, to the offi- [*56] cers, seamen and others, such shares of the net proceeds of the sales of oil, whalebone and head matter, or seals, or other animals or substances whatsoever, the produce of the South Seas, caught or taken or obtained by the said ship's company, after deducting the usual charges and expenses, as were set opposite to their respective names and seals affixed thereto. And it was thereby further agreed, that John Samuel Parker, as the captain of the ship, should receive one-twelfth lay or share of the profits of the homeward voyage, and John Inkley should receive one-fortieth lay or share, and plaintiff one-sixtieth lay or share thereof, and that such other persons who composed the remainder of said crew should also receive the other shares or proportions therein mentioned. The bill stated, that this agreement was in possession of the defendant, who refused to produce it. The ship sailed in August, 1820; and returned in November, 1823, when the vessel arrived in the port of London, with 266 tons and 165 gallons of oil. The bill charged, that, on the arrival of the ship in London, the plaintiff and crew were in very necessitous circumstances; and plaintiff was prevailed upon by Messrs. Moses and Levi, the agents of the defendants, to accept and take the sum of 41*l.* in full of 145*l.*, and to sign some memorandum or paper-writing, purporting, as it is alleged, to be a receipt for the same; and further charged, that defendant settled with plaintiff and the rest of the crew at 42*l.* per ton, as the then market price of the said oil, and actually charged the discount to the crew for prompt payment at such price: whereas plaintiff had since discovered, as the fact was, that, whilst the ship was out at sea, the defendant had actually sold, or contracted or agreed to sell, to some person or persons unknown to plaintiff, a considerable part, amounting to one-fourth or thereabouts, of the said *cargo, at 52*l.* per ton, and that such last mentioned [*57] contract had since been carried into execution, and that the purchase money had been actually paid or secured to be paid

under the same, or otherwise that such contract was about forthwith to be carried into execution, and the money about to be paid under the same; and plaintiff therefore charged, that he and the rest of the crew ought to have been permitted to have had a share in the benefit of such contract, and that the defendants were guilty of a fraud in suppressing from plaintiff and the rest of the crew, the fact that they had sold such one-fourth of the said cargo as aforesaid at 52*l.* per ton, and in not allowing them the full benefit of such contract; and that the defendants ought therefore, then, to be debited with such last mentioned one-fourth part of the oil at the aforesaid rate of 52*l.* per ton, and with the remaining three-fourths of the cargo of oil at the rate of 42*l.* per ton, being the price at which they had admitted they actually sold such remaining three-fourths of such cargo. And plaintiff further charged, that although the defendant then pretended, and still did pretend, that the gross produce of the cargo, after allowing discount, computing the same at 42*l.* per ton, amounted only to 10,647*l.*; yet plaintiff charged, that the defendants on or about the 10th of March, 1824, made out and delivered, or caused to be made out and delivered, to J. S. Parker, as captain of the ship, a certain account in writing, entitled "Statement of the cargo and charges thereon ship Elizabeth;" and that in such account they gave him credit for 286 tons and 165 gallons of oil, which in fact, as plaintiff charged, comprised the real quantity of the cargo. And plaintiff further charged, that the defendants, or their agents, in such account gave credit for the whole cargo of oil at 41*l.* 10*s.* per ton; and that, taking the same at the last mentioned rate, they acknowledged [*58] and admitted, by *such last mentioned account, that the gross proceeds of the oil amounted to 11,066*l.* 3*s.* 4*d.*, exceeding by the sum of 419*l.* 3*s.* 4*d.*, the amount of the gross proceeds for which they gave plaintiff credit, although they allowed such oil to plaintiff after the rate of 42*l.* per ton. And further charged, that J. S. Parker insisted, by himself or his agents, after the receipt of the account, that defendants should credit him with one-fourth of the oil which had been sold by them as aforesaid, during the time the said ship was absent on her said voyage, after the aforesaid rate of 52*l.* per ton, and that

the defendants ultimately acceded thereto, and did, in fact, settle with J. S. Parker as such captain of the ship, and pay him for one-quarter of the cargo of oil, comprising 66 tons and 250 gallons, at and after the rate of 52*l.* per ton. And further charged, that defendants, having so settled with and paid the captain after such rate, were bound to pay plaintiff and the other unsatisfied part of the crew in like manner, after the rate of 52*l.* per ton for one quarter of the oil, but that they refused to do so.

Plaintiff further charged, that the settlement with him ought to be declared null and void, and that the defendants ought to set forth the accounts; and the bill prayed for an account of the dealings and transactions of the voyage, and of the moneys arising from the sale of the cargo, and sums of money expended; that the former settlement might be set aside; that one-quarter part of the cargo ought to be accounted for at 52*l.* per ton, and payment made to plaintiff and the rest of the crew of what should appear to be due to them respectively.

The defendants, by their answer, admitted the agreement in substance, and said that it was agreed and understood that the agreement for engaging the plaintiff and the other persons forming the crew of the ship for *the voyage, was [*59] to be in all other respects upon the terms and conditions which were usual and customary in South Sea voyages. The defendants admitted the articles to be in their possession, and they admitted that the ship arrived in the port of London as mentioned in the bill, having on board a cargo of oil, the produce of the voyage, the quantity of which, as it eventually appeared, was 266 tons and 165 gallons. The defendants further said, that, during the absence of the ship on the voyage, they became desirous of selling a part of the cargo expected to be brought back in the ship; but inasmuch as they considered that it would not be right or advisable to speculate with the proportion of the cargo to which the officers and seamen of the ship were entitled, especially as the price of oil had fallen about 20*l.* per ton since the sailing of the ship on her voyage, and had become lower than it had been for many years, and the officers

and crew might, in the event of the price rising, be dissatisfied with such sale by anticipation, they determined to sell one-fourth part only of the expected cargo as a part of their own share or proportion thereof; and they accordingly, some time before the arrival of the ship, sold such one-fourth part of the expected cargo at the price of 52*l.* per ton, to be paid in bills of exchange at four months, or in money, deducting 2 1-2 per cent. discount, at the option of the buyers, at the end of fourteen days after landing at the seller's wharf; and such was considered, and was in defendants' instructions to the brokers employed to effect the sale expressly stated, to be made on their own account only, and as affecting their own share of the cargo only; and in case the price of oil had risen between the time of the sale and the arrival of the ship, the defendants alone would have borne the loss arising from such sale. And the defendants further answered, that it had become customary for the owners of such vessels,

*with the assent of the officers and seamen, to take the [*60] cargoes at the market price at the time of the arrival of the ships, and afterwards to sell the same on their own account; and that, shortly after the arrival of the ship, Messrs. Moses & Levy—who were generally appointed to settle the accounts between the owners and the officers and crews of ships engaged in the southern whale fishery in respect of the cargoes, and who were appointed the agents of defendants for the like purpose with respect to the cargo brought home by the ship *Elizabeth*—did, according to such custom or practice, make out an account of the net value of the cargo, and of the shares thereof belonging to or due to the several officers and seamen. And Mr. Deacon, the cooper, who was employed to ascertain the quantity of oil brought home by the vessel, and who was a person of great skill, experience and respectability in his business, having reported the same to amount to 260 tons, (after making, by computation, such allowances and deductions as were customary on the sale of such cargoes,) the cargo was estimated at that quantity, and the market price of such oil then being estimated or taken in the account at the rate of 42*l.* per ton, and a deduction of 2 1-2 per cent. made therefrom on account of the discount for money on the amount of the price of the oil, and the other usual charges

and expenses were also deducted from the same; and defendants added, that Moses & Levy had settled accounts with the remainder of the crew in like manner, and that they had sold the remainder of the cargo at 41*l.* 10*s.* per ton; they denied that the plaintiff was pressed for money, and also all fraud; and they alleged that oil varied in quantity according to the state of the atmosphere. The defendants also said, that after the settlement the plaintiff called on them, and asked to be allowed something for having acted as chief mate; when the sale of a quarter part of *the cargo, previous to the arrival of the ves- [*61] sel, was mentioned, and plaintiff said he was satisfied: defendants at the same time making him a present of 5*l.* for having acted for some time as chief mate, and upon the understanding that all accounts were settled, and that the plaintiff should make no further claim.

There were depositions on the part of the defendants proving the correctness of the account, and that 42*l.* per ton was beyond the then price of oil, and that plaintiff inspected the accounts, and appeared quite satisfied therewith.

Mr. *Bickersteth* and Mr. *Phillimore*, for the plaintiff:—By the contract, the plaintiff, as second mate, was entitled to a sixtieth share. In the accounts made out by Messrs. Moses & Levy, the proceeds were stated at less than they really were. The plaintiff and crew were settled with only for 260 tons, and those at 42*l.* per ton: in fact, the quantity was greater; and a fourth part of the cargo had been sold, before the vessel arrived, at 52*l.* per ton. The defendants allege, that it was their own share as owners which they sold; but we contend that they had no right to sell a portion for themselves. It is true, that when the vessel arrived the oil was only worth 42*l.* per ton. The real quantity was six tons more than was accounted for, and a reason assigned for this by the defendants is, that the quantity of oil is affected by the weather; but the crew are entitled to their shares on the quantity sold, and the money at which the cargo has been actually sold. The plaintiff has not received his part, for he is entitled to a share of all the cargo.

THE MASTER OF THE ROLLS:—The defendants have clearly acted by mistake; for they were not entitled to a part of [*62] *the cargo, but only to a part of the produce, and they are bound to account for the whole produce, and are not entitled to any advantages; but it appears that the mode of dealing had been stated to the plaintiff, and he settled accordingly. It is much too late for the plaintiff now to come into equity for relief. With respect to the quantity of oil, it appears to be the custom for the cooper to estimate it. That estimate, in this case, was 260 tons, and it was so stated to the plaintiff: it turned out to be seven tons more, but it might have been seven tons less; the plaintiff accepted and acted upon the estimate. It is too late now for the plaintiff and crew to come into equity, when they find they have made an unprofitable speculation. The bill must, therefore, be dismissed, and with costs.

Mr. *Knight*, then referring to the unnecessary statements in the bill, and the great expenses which had been incurred by inquiries rendered necessary by those statements, called upon the court to fix the costs upon the plaintiff's solicitor, it being sworn in the answer that the plaintiff had declared that the solicitors had indemnified him against the expenses of the suit; and in an affidavit in a former proceeding, it was imputed to the plaintiff's solicitors that they were to indemnify the plaintiff in costs.

The MASTER OF THE ROLLS said he could not entertain it in that way—a petition must be presented.

*BETWEEN THE EARL OF WINCHELSEA AND VAUGHAN, [*63]
BART., *Plaintiffs*, AND ELEANOR GARRETTY AND OTHERS, *Defendants*; AND BETWEEN HENRIETTA BELLINDEN AND OTHERS, *Plaintiffs*, AND VAUGHAN, BART., AND EARL OF WINCHELSEA, *Defendants*; AND BETWEEN VAUGHAN, BART., *Plaintiff*, AND ELEANOR GARRETTY AND OTHERS, *Defendants*.

Bond.—Indemnity.—Bounty.

WESTMINSTER HALL.—1829: Monday, 29th June.

Two ladies borrow 10,000*l.* of Coutts & Co., on the bond of themselves and G. N.; they give a bond for 12,000*l.*, at the same date, to G. N. A question having arisen whether the bond was for indemnity, or a gift for services, or otherwise, the court directed issues to be tried before a jury.

THIS cause came on upon exceptions: the first cause was for establishing the will, and taking the accounts of the personal estate of Lady Essex Ker; and the second cause was by a cross bill, stating that Lady Mary Ker and Lady Essex Ker, were, in their lifetime, as co-heiresses, seised of lands in Scotland; and that they jointly and severally had contracted various debts, and given several securities for the payment of some such debts to a considerable amount; and, amongst other such securities, they executed and gave a joint and several bond under their hands and seals to one George Nicholls, for securing the payment of the sum of 12,000*l.* and interest, at 5 per cent. per annum; and a joint and several bond to Thomas Coutts, Esq., and others, his *partners, for securing the payment of the sum [*64] of 6,000*l.* (which was afterwards found to be 10,000*l.*) and interest at the rate aforesaid; both of which bonds were executed in England, in the usual form of English bonds.

George Nicholls claimed the bond given to him before the master, and a reference was made to inquire into the consideration of it; in which he was examined, and the master's report set forth that examination at considerable length, the material parts of which will be found in the arguments of counsel; and found that Lady Essex Ker, the testatrix in the pleadings in this

cause named, employed, for many years previous to her death, Messrs. Coutts & Co. as her bankers; that the said George Nicholls was also, for many years previous to her death, the confidential friend and adviser of Lady Essex Ker, and in the habit of raising money to supply her occasions by procuring advances from Messrs. Coutts & Co., upon joining in notes and other securities with the testatrix and with Lady Mary Ker, her sister; that in the month of February, 1813, a sum of 2,000*l.* was borrowed from Messrs. Coutts & Co. by Lady Essex Ker, and for which sum George Nicholls joined in a bond, bearing date the 8th February, 1813, as a security for the payment thereof; that in the month of July, 1815, Lady Essex Ker, the testatrix, having occasion for a further loan, applied to Messrs. Coutts & Co., through the agency of George Nicholls, to advance her and her sister, Lady Mary Ker, the sum of 10,000*l.*; and which they agreed to do, on having the bond of Ladies Essex and Mary Ker, and George Nichols, as their surety to secure the repayment thereof; and accordingly the bond stated in the charge of George Nicholls and Messrs. Coutts & Co., bearing date the 15th day of July, 1815, was given to them. And after paying themselves the amount of all previous securities which had been [*65] given to them, the *balance of the 10,000*l.* was placed by them to the separate accounts of Lady Essex Ker and Lady Mary Ker, in the proportions each party was entitled to. That on the 15th July, 1815, the testatrix and Lady Mary Ker gave to George Nicholls the bond stated in his charge, and in the charge of Messrs. Coutts & Co. for securing the sum of 12,000*l.* and interest. That, at the time such last mentioned bond was given, Messrs. Barclay & Moore, of Lincoln's Inn, were the solicitors of the ladies; and, upon inspection of their bills, it did not appear that they were consulted, nor was any professional person present when the same was executed. The plaintiffs had, therefore, submitted to the master, that such last mentioned bond was given to George Nicholls as an indemnity to him against his liability to pay to Messrs. Coutts & Co. the sum of 10,000*l.* for which he had joined the ladies in a bond to Messrs. Coutts & Co., and for any future sums that he might

procure for them on his responsibility ; and that no consideration was paid to the obligors by George Nicholls.

Several letters of George Nicholls were set forth in the report, expressive of his personal inability to advance money.

And the master also found that Lady Essex Ker, in and by her last will and testament, bearing date the 7th day of September, 1819, gave and bequeathed to George Nicholls the sum of 2,000*l.* in the following words :—" To my friend George Nicholls, for his services, I leave 2,000*l.* ;" and, upon consideration of the examination, the letters and the several circumstances thereinbefore stated, the master was of opinion, that the bond under the hands and seals of the Right Honorable Lady Essex Ker, and the Right Honorable Lady Mary Ker, was not a bond of indemnity, but was a voluntary bond given to *George [*66] Nicholls as a bounty by the Ladies Essex and Mary Ker, without any consideration having been paid or given by George Nicholls for the same.

Sir R. W. Vaughan, Bart., excepted, that the master ought to have certified, that the bond was given to George Nicholls by way of indemnity against payments made and liabilities incurred by him on account of Lady Essex Ker and Lady Mary Ker.

And George Nicholls excepted, that the master ought not to have certified that the bond was given to him (George Nicholls) as a bounty by the ladies, without any consideration having been paid or given by George Nicholls for the same, but ought to have certified that the same was given to George Nicholls by the Ladies Essex and Mary Ker, partly for services performed by him, (George Nicholls,) and partly for money lent and advanced by him to the ladies.

Mr. Pemberton in support of the first exception :—The Ladies Ker became bound to Messrs. Coutts for 10,000*l.*, on the 25th of July, 1815. Another bond of the same date has been carried in : both bonds bear date the same day ; the latter to Mr.

Nicholls for 12,000*l.*; that gentleman was a surety for them to Messrs. Coutts. The claim was resisted by the executors, they considering it to be a counter security to Mr. Nicholls. A reference was made to the master to inquire into it, and an order was made that Mr. Nicholls should be examined. The master has found that the bond to Mr. Nicholls was not a bond of indemnity, but was a bounty to Mr. Nicholls without consideration. Both parties have excepted to this finding: the executors against the finding that it was not indemnity; and Mr. Nicholls [*67] against its being a gift. *Mr. Nicholls, in his examination, has deposed to various payments made by him, that he gave up the vouchers and securities for moneys due to him when the bond was given to him, and that the Ladies Ker meant by their bond to satisfy his services, of which they frequently spoke; and that those ladies fixed the sum of 12,000*l.* themselves, although the sum of 10,000*l.* was originally fixed upon. This appears to prove, that it was meant to be an indemnity for the like sum for which he was security in the bond to Messrs. Coutts. The effect of the examination appears to be, that there was no settlement of accounts when the bond was given. Our belief is, that to the extent of 10,000*l.* it was indemnity, the remaining 2,000*l.* a gift.

THE MASTER OF THE ROLLS:—How can this be settled without a jury? In a case of this sort, it is right to give the parties an opportunity to proceed at law.

Mr. *Tinney* and Mr. *Wigram* for Mr. Nicholls' representatives. We proceeded at law in Scotland. Mr. Nicholls is dead. Miss Garretty, a confidential servant, is dead; and Mr. Moore is dead; both of them were well acquainted with the circumstances of this case. No further evidence can be produced. The evidence now consists of Mr. Nicholls' examination, and some letters: there is now no evidence but what is found in the report. Every person is dead who knew anything about it. We admit that we cannot make out any proof of moneys paid; we contend that the bond was given for services: it has no reference to the bond to Coutts; no presumption arises that it was indemnity,—the only ground for it is, that both bonds are of the same date. Mr.

Coutts himself advanced Mr. Nicholls 3,000*l.* on this bond, which shows his opinion to have been that the bond was a good one.

**Mr. Stuart* for defendants in the third suit. [*68]

Mr. Pepys, for persons interested in the estate of the Ladies Ker, pressed for an issue.

THE MASTER OF THE ROLLS:—I know no instance in which a court has decided such a case without a jury. Take these issues:—

First. Whether, at the date of the bond, the Ladies Ker were indebted to Nicholls for services by him performed or moneys advanced?

Secondly. Whether the bond was an indemnity to Mr. Nicholls for his joining in the bond to Coutts, or in respect of any other engagement into which he might have entered as a surety for these ladies?

Thirdly. Whether the bond was, as to any and what part, intended as a gift to Mr. Nicholls?(1) The representatives of Mr. Nicholls to be plaintiffs in the first and third issues; the plaintiffs in equity to be plaintiffs in the second issue.

Let the jury indorse any special matter.

(1) Permitting personal property to go into possession of a daughter on her marriage, and to remain there a considerable time, raises a presumption of a gift; if any condition is attached to the gift, it must be expressed at the time the possession is changed. *McDonald v. Crockett*, 2 M'Cord's Ch. Rep. 131. A father, anterior to our Statute of Frauds, having delivered certain slaves to his son, which were proved by verbal evidence, (without any deed or writing,) to have been lent for an indefinite period, and the son having retained the uninterrupted possession for many years, used the property as his own, and acquired credit on the strength of his possession; in a controversy between the father, or volunteer claimants under him, and creditors of, or fair purchasers from the son, the father shall be deemed to have given him the slaves. *Fitzhugh v. Anderson*, 2 Hen. & Munf. 289. Where a father, on his daughter's marriage, sent home property with her, it was presumed to be a gift as between the parties, and should be taken as such in favor of the creditors, but a declaration accompanying the delivery may rebut the presumption. *Collier v. Pope*, 1 Dev. Eq. 55. Since the passage of the act of North Carolina, of 1806, which requires the gift of slaves to be in writing, the common law presumption can-

1829.—*Beevor v. Simpson.*

not arise that slaves sent by the father-in-law to a son-in-law were intended as a gift; the possession of the son-in-law may be consistent with the right of property of the father-in-law. *McDonald v. McDonald*, 8 Yerger, 145. A gift executed by delivery is binding; actual manual delivery is not necessary; it is enough that the donee have possession with the assent of the donor. *Eswein v. Seigling*, 2 Hill, 601. As to what will be a sufficient delivery to constitute a gift, see *Jones et al. v. Blake et al.*, 2 Hill, 632. A delivery of slaves, by a father to his son, shortly after the son's marriage, held, on the evidence, to be a loan and not a gift, and consequently that the father might dispose of the slaves by will. *Fraser v. McClenagan*, 2 Richardson's Eq. Rep. 79. Where a parent, upon the marriage of his daughter, puts her in possession of slaves, or other chattels, without reserving the right to reclaim, or otherwise qualifying the possession, an intention to give will be presumed, and the gift perfected by the act of delivery. *Edings v. Whaley*, 1 Richardson's Rep. 301. As to real estate, it seems that an intention to give will never be implied from the mere naked possession, with the assent of the parent. *Ib.* Where a deed of gift was found among the papers of a dead man, executed by him and witnessed; Held, that these facts alone would not constitute sufficient evidence of a delivery to perfect the title of the donee. There must have been acts and declarations of the deceased, showing that he regarded the signature and witnessing of the deed as passing the title. *Martin v. Ramsey*, 5 Hump. Tenn. Rep. 349. Where a person makes a purchase and advances a consideration, the property is *prima facie* his own, although the title is taken in a third person's name; but this presumption, or implied trust, may be repelled, and the onus to that effect is on the grantee named in the deed, provided he is a stranger; but not so where the grantee is a wife or child. *Astreen v. Flanagan*, 3 Edw. Ch. Rep. 279. Where a child is so by adoption, and a conveyance of land purchased is taken in the name of the child, the principles growing out of the relation of parent and child may be considered as applicable. *Ib.* Case where an alien adopted an infant about five years of age, and had a lot conveyed in her name, the conveyance remained in the infant's family; and although he assumed acts of ownership, yet, as there was evidence to show he called it the infant's property, the court, under all the circumstances, decreed it a gift, and not a case of trust. *Ib.* What combination of circumstances will bring a case within the legal definition of gift is essentially a matter of evidence, and not of law; and, therefore, each particular case must depend upon its own circumstances. *Henson v. Hinard*, 3 Strobhart's Eq. Rep. 371.

[*69]

*BEEVOR v. SIMPSON.

Vendor and Purchaser.—Specific Performance.—Attorney and Client.

WESTMINSTER HALL.—1829: 30th June.

A., having purchased land, left the investigation of the title to C. and D., solicitors, in partnership. They advise that a good title can be made, and the purchase is

1822.—Beever v. Simpson.

thereupon completed. D., the solicitor, was a trustee in the conveyance, to bar dower. A. dies, and his devisee sells the property to D., one of the solicitors. D. did not object to the title until eight months afterwards; in his answer he said he had no recollection of the title.

Held, that a solicitor, who has been employed to advise on a title, could not, on purchasing it himself of his client, set up an objection to it which he did not think of any importance when advising his principal.

Decree for specific performance.

THE plaintiff being seised in fee of a messuage or dwelling-house and land, in August, 1825, contracted to sell the same to the defendant for 4,500*l.*, and to deliver possession to the defendant on the 25th of March next, on payment of that sum. There was nothing said in the agreement with respect to the vendor making a title. The bill charged, that the defendant had a full knowledge of the title; and that he entered into the contract with the plaintiff with the intention and understanding that he should take and accept the title of the plaintiff, and take a conveyance of the same from her, without requiring any other or better title thereto to be made out by the plaintiff; and, as evidence thereof, the plaintiff charged, that in or about the month of March, 1818, Henry Beever, doctor of medicine, since deceased, late husband of the plaintiff, being desirous of purchasing the land whereon no buildings then stood, and which was then the property of one Stephen Mear, for the purpose of building a dwelling-house and offices thereon, employed the defendant, who then was and had been for many years previously thereto, and continued to be till the death of Doctor Beever, his solicitor and confidential friend and adviser, as his solicitor and agent in negotiating such purchase on his behalf with Stephen Mear, and in investigating Stephen Mear's title to the land. And that, accordingly, the defendant did, as his *solicitor and [*70] agent, and on behalf of Beever, investigate the title of Stephen Mear to the land; and thereupon advised him that Stephen Mear had a good title, both legal and equitable to the same, and did not advise him that the legal estate therein was, as the defendant had since objected, in the heir at law of one Mary Drinkwater, or that there was any defect whatsoever in the title of Stephen Mear; and that the conveyance by lease and release was prepared by the defendant, and to which he was

himself a party, as trustee, for the purpose of preventing the attachment of dower. That the title of Stephen Mear was derived under the will of Mary Drinkwater, and was the same title to which the defendant had made an objection; and that, in consequence of such advice of the defendant, Doctor Beavor completed his contract, and built a dwelling-house and offices at the expense of 2,000*l*.

The bill also charged the following facts: That the plaintiff was the devisee of Doctor Beavor; and, in entering into the contract with the defendant, she was not assisted or advised by any other solicitor but himself.

That on the 25th of October, 1825, the defendant paid to the plaintiff the sum of 500*l*. in part payment, and the defendant never called for an abstract till April, 1826; and, after the same was delivered to him, he agreed with the plaintiff for some fixtures in the house, and joined with her in appointing a person to value them. The defendant never made any objection to the title till August, 1826. The prayer was for a specific performance.

The defendant, by his answer, stated, that he carried on the business of an attorney in partnership with Mr. William [*71] Rackham; and he admitted, that he and his *partner were employed by Doctor Beavor as his solicitor; and although he admitted that the abstract was perused and examined in their office on the part of Doctor Beavor, yet he did not recollect or believe that he did himself peruse or examine the same; and if he did in fact do so, that he had no recollection whatever of the contents thereof, or of the title of the plaintiff to the premises in the bill mentioned, or any part thereof, at the time of his entering into the agreement. Nevertheless, the defendant said that, from the present state of the title, he believed that it appeared by the abstract received by the defendant, that the fact was that a good title could not be made to the premises, or to any part or parts thereof, (except the premises purchased of one Jonathan Mitchell,) in consequence of the legal estate in the whole of such

premises being outstanding. And the defendant said, he objected to the title, that the legal estate of such parts of the premises as were purchased of Stephen Mear was outstanding in the heir at law of Mary Drinkwater, and that he had no recollection of the plaintiff's title at the time of his (defendant's) purchase. And the defendant admitted that he was a trustee of Henry Bevor in the conveyance to the latter for the purpose of barring dower; and that the conveyance was drawn, prepared, settled and approved at the house of defendant and his partner, but not, as the defendant believed, by him, but by his partner.

The other parts of the bill were admitted in the answer. It was also charged by the bill, and admitted by the answer, that the defendant purchased these premises for a company which he had joined for the purpose of supplying the city of Norwich with water; and that it was mentioned in the specifications left with the clerk of the peace, preparatory to an act of Parliament, that these premises were the property of the company.

**Mr. Bickersteth* and *Mr. Kindersley* for the plaintiff:— [*72] The question is, Whether the defendant is entitled to a better title than the plaintiff now has, and in particular, with respect to the legal estate outstanding in the heir at law of Mary Drinkwater? The defendant has admitted that, on the occasion of the purchase by the late Mr. Bevor, the title was passed through the office in which he is a partner; but he endeavors to escape from the responsibility of it, by his answer, that he did not recollect that he himself perused it. If this were material, it was well met by an indisputable fact, that the defendant was a trustee in the conveyance to the several uses and trusts, which conveyancers introduce to prevent dower from attaching to the land; and this is strong evidence that the defendant was the particular member of the firm retained by Dr. Bevor, and in whom that gentleman confided. It is clear, that when the defendant entered into the contract, he did not intend to question the title; and, in fact, never did until after the time had elapsed when he ought to have completed his contract; nor until the plaintiff found it necessary to employ another solicitor, in conse-

1829.—Beevor v Simpson.

quence of the delay of the defendant in carrying his contract into execution. The court cannot allow a solicitor thus to act. The defendant had accepted the title; since, in the specification deposited with the clerk of the peace, this property is stated to be the property of the intended Norwich company, in which he was also a partner. That speculation, however, was not proceeded in, and the defendant now found it convenient to disclaim that admission. At the time of the purchase, the defendant well knew that Doctor Beevor bought the land for the express purpose of building a house upon it; and, therefore, it was doubly wrong in the defendant, as his solicitor, to overlook an objection to the title.

[*73] *Mr. *Pepys* and Mr. *Turner* for the defendant:—One of the grounds relied on by the plaintiff, is the defendant's situation in 1818, when Dr. Beevor purchased this property, as to which, it is said, that the defendant had the management of the purchase; but the defendant, by his answer, has denied that he had personally anything to do with advising Dr. Beevor to complete the purchase. Surely a solicitor is not bound by all the circumstances that have taken place in the office of himself and his partner as controlling his own equities. On such a principle, every counsel and solicitor who had advised on a title to property which they might subsequently happen to purchase, must, themselves, take it on the same title. It was also said, that the defendant had done nothing up to March, 1826; but, on the other hand, the plaintiff did nothing,—the purchase went on, as between other parties, until the objection was discovered; to establish a waiver of it, there must be actual personal notice.

THE MASTER OF THE ROLLS:—The defendant merely denies it upon recollection.

Mr. *Pepys*:—But in this case the defendant had no actual notice; and he does not come within the proposition of a man proceeding under a contract, with the knowledge of a defect. The payment of part of the purchase money is no waiver of title, and very commonly occurs. As to the valuation of the fixtures, in

1829.—*Salmon v.*

purchases of land when the timber is to be valued, the valuation goes on contemporaneously with the investigation of the title. It is always assumed that a vendor shall make a good title; and unless the court shall be of opinion that a solicitor, who has been employed eight years before on the purchase by the vendor, is bound to take a purchase without any title, a decree will not be made for the plaintiff.

*THE MASTER OF THE ROLLS :—It is not to be endured [*74] in a court of equity, that a solicitor, who has been employed by a person to advise on the title to a property, should, on purchasing the same property from his client, set up an objection to the title which he did not think of any importance when advising his principal. The inference arising from the defendant's answer is, that he was consulted, and that is supported by the circumstance of his being a party to the conveyance: it is also to be inferred, that he was perfectly acquainted with the title at the time he entered into the contract; his denial of recollection amounts to nothing.

Decree for specific performance, with costs.

SALMON *v.*

Practice.

WESTMINSTER HALL.—1829: 3d July.

The court will, on the petition of an assignee of the reversion, order the Accountant-General not to transfer stock, although the petition has not been served on the assignor.

MR. ROGERS for the petitioner:—The prayer was, that the Accountant-General might not transfer a sum of stock without notice to the petitioner. The petition stated an assignment of the reversion of the stock to the petitioner, and there was an affidavit of the execution of the deed. The petition had not been served on the assignor.

The MASTER OF THE ROLLS doubted at first whether he could

1829.—Drury v. Atkins.

[*75] grant the order, unless the assignor were served; *but on Mr. Rogers suggesting that this was merely to prevent a fund being transferred without notice, and not an application for the fund itself, his Honor told him he might take the order.

DRURY AND ANOTHER v. ATKINS AND ANOTHER.

Navy Agents.—Customs of Merchants.

WESTMINSTER HALL.—1829: 7th July.

By the act of 59 G. III, c. 111, navy agents are entitled to make the usual charge for passing accounts before that act; and are also entitled to charge commission on the full amount of pay, without being limited by the money actually passing through their hands. The defendants having received 450*l.*, as two and a half per cent., returned premium on 18,000*l.* in 1814, without bringing it to account for many years, alleging that it awaited the final adjustment of average, referred to the master, to inquire whether he was entitled so to retain it, according to the usage and custom of merchants.

THE bill was filed by persons interested in the estate of the late Admiral Drury against the defendants, who were merchants and navy agents in London, for an account of their various receipts and payments, as navy agents to the admiral, or otherwise, from 1788; and the answer set forth all these accounts and a long correspondence. but, at the hearing, the complaint was reduced to two heads:

1st. That the defendants had charged commission on all the admiral's pay, whether received by them or drawn for by the admiral himself, and never having passed through their hands, and also some fees on passing accounts.

2dly. That they had received, on the 31st of October, 1814, the sum of 450*l.*, on account of a policy of 20,000*l.*, effected on captures, being a return premium on 18,000*l.* at 2 1-2 per cent., which they did not then give credit for in their accounts; [*76] but which, defendants contended, *they held as a sum

which had awaited a final adjustment of average, and remained for some time unarranged with the underwriters thereof.

Mr. *Bickersteth* and Mr. *Merivale* for the plaintiffs.

Mr. *Agar* and Mr. *Beames* for the defendants.

With respect to the first question, the plaintiff's counsel cited the act 31 G. II, c. 10, by which it is declared unlawful for navy agents to charge more than 6*d.* in the pound for receiving wages, and their trouble and attendance in relation thereto; and the defendant's counsel then produced the act 59 G. III, c. 111, by which the agent is allowed to charge the 6*d.* in the pound on the full amount of pay, and is not limited to the moneys that actually pass through his hands; and by which act, on all accounts passed previously thereto, it is declared lawful for navy agents to have made the usual and customary charges for passing such accounts; and his Honor said, that by that act the conduct of the defendants was authorized and the point settled.

Then with respect to the 450*l.*, which was the only remaining matter to be questioned, one of the defendants, who was present in court, explained, that he insured 20,000*l.* for the admiral; that the loss was a partial loss on board different ships. The money received by him was retained for two purposes: one with respect to the average: the other, to ascertain that the admiral had an interest in the goods lost.

THE MASTER OF THE ROLLS:—This receipt of 450*l.*, by the defendants, does not appear to have been in their character of navy agents. I cannot refuse the inquiry, Whether they were *entitled to retain the 450*l.* received by them in 1814, [*77] according to the custom of merchants? Dismiss the bill, so far as it seeks to open the accounts generally. Refer it to the master to inquire, Whether, according to the custom of agents or merchants, the defendants were entitled to retain the sum of 450*l.*, from 1814, when received, without bringing it to account until the averages were settled or compromised? with liberty to state special circumstances.

1829.—*Devey v. Peace.*

DEVEY *v.* PEACE.*Will.—Death of Trustee in Testator's Lifetime.—Practice.*

WESTMINSTER HALL.—1829: 10th July.

Where a sole trustee in a will, to whom a term of 2,000 years was devised, dies in the testator's lifetime, the court will refer it to the master to appoint a new trustee, and to settle and approve of a demise for the like term.

FRANCIS PEACE, by his will, devised his real estate unto his brother, William Peace, his executors, administrators, and assigns, for the term of 2,000 years, upon trust to raise a sum of 4,000*l.*, and as therein mentioned, and subject thereto, as to one moiety to Thomas Peace for life, remainder to trustees during his life, to preserve contingent remainders, with remainder to the eldest son, &c., of Thomas Peace, who should be living at his death, upon his attaining the age of twenty-one, with remainders over in case there should be no son, or, if any, he should not attain that age. The other moiety was limited to George Peace in like manner. William Peace died in the testator's lifetime.

Thomas Peace had no issue, and the children of George Peace were all under age.

The prayer of the bill was, that the trusts of the term might be carried into execution, and that a trustee might be appointed in the place of William Peace.

[*78] *The expediency of raising the moneys provided for by the term was acquiesced in by all the counsel, and the only question was, how it should be accomplished.

Mr. *Knight*, for the plaintiff, suggested that the tenant for life and trustees should join for this purpose in destroying contingent remainders.

THE MASTER OF THE ROLLS:—Refer it to the master to ap-

 1829.—*Collyer v. Burnett.*

point a new trustee, and to approve of a demise or lease for a term of 2,000 years, for the like purposes as in the will.

Only one trustee having been appointed by the will, the master will only have to name *one*.

**COLLYER v. BURNETT.*

[*79]

Foreign Charity.

ROLLS.—1829: 10th July.

The court orders a legacy to a foreign charity to be paid over, as it will not administer the funds of a foreign charity.

Legacies to charities in Ireland are administered by commissioners there, under an act of the Irish Parliament.

MR. CAPRON for the petitioner:—The testator gave 9,000*l.* stock, and a sum of long annuities, to his children, and, in an event which happened, to the rector and parishioners of the parish of Lesbourne, in Ireland. It is stated in the master's report, that the event had happened; and that, by an act of the Irish Parliament, (a) certain commissioners were appointed for the administration of charitable funds in Ireland, and that this bequest came within their jurisdiction. This being a foreign charity, the court would not administer the funds, but leave that duty to the persons to whom the same was to be paid.

The MASTER OF THE ROLLS ordered the stock and annuities to be sold, and the produce to be paid to the commissioners.

NOTE.—A similar order, to the extent of the dividends only, seems to have been made in the *Attorney-General v. Lepine*, (2 Swanst. 181,) with respect to a charity in

(a) The act referred to is the 40 G. III, c. 75, and the proceedings under it have lately been noticed in the report of a committee of the House of Commons on the Irish miscellaneous estimates; and it appears that, since 1802, the commissioners have recovered sums belonging to various charities, which had been diverted from their proper purpose, to the amount of 239,707*l.* 17*s.* 10*d.*, and permanent annuities to the amount of 3,853*l.* 6*s.* 9*d.* per annum.

 1829.—Bass v. Clivley.

Scotland; but a reason assigned there was, that the courts in that country had jurisdiction to direct the establishment of the proper charity. In the recent case of *Emery v. Hill*, (1 Russ. 112,) Lord Gifford, Master of the Rolls, directed the transfer of the stock to the trustees of a Scotch charity, on the general principle stated by Mr. Capron. See, also, the case of *Minet v. Vulkiamy*, (given by Mr. Russell in a note to the case of *Emery v. Hill*;) *The Provost of Edinburgh v. Aubrey*, (Amb. 236.) The mortmain statute, 9 G. II. c. 36, it has been decided, does not extend to money given to Scotch charities to be invested in land in that country.(a)

(a) *Oliphant v. Hendrie*, 1 B. C. C. 571; *Mackintosh v. Townsend*, 16 Ves. 330. See, also, *Campbell v. The Earl of Radnor*, 1 Bro. C. C. 271; *Curtis v. Hutton*, 14 Ves. 537, and 19 Ves. 309.

[*80]

*BASS v. CLIVLEY, WIDOW.

Contract for a Loan.—Costs.

ROLLS.—1829: 17th July.

A. agrees to lend B. 3,000*l*. on mortgage of leasehold houses, and not to call for the title of the lessor, and advances 600*l*. in part. He then calls for the lessor's title, and files a bill for specific performance, or sale of the property to repay him the 600*l*. and interest.

Held, that he was not entitled to the title, but only to a specific performance of the contract, as proved; and that the plaintiff, not obtaining the decree he asked, shall pay the costs.

THE bill states, that the defendant, being in want of money, directed William Oliver to apply to the plaintiff for the loan of 3,000*l*., which the plaintiff agreed to lend for five years, at lawful interest, on having a sufficient and valid mortgage of five leasehold houses; and the plaintiff paid him 600*l*., when Oliver, as such agent, deposited with the plaintiff one of the leases, and signed a memorandum in writing, declaring that he had received that sum for the defendant, and that he had deposited the lease for securing the repayment thereof with interest; the remainder was to be advanced to him as soon as the necessary securities should be prepared; but the defendant had refused to show her lessor's title. The bill prayed, that the defendant might be de-

creed to perform the agreement, and to accept or receive the sum of 3,000*l.*, which the plaintiff was willing and offered to advance, on having the whole of the principal sum secured by mortgage, according to the agreement; or that an account might be taken of what was due to the plaintiff for principal and interest on the 600*l.*; and *that the defendant might be decreed [*81] to pay what, on taking the account, should be found to be due to him thereon; or that the lease or leasehold premises might be sold, and the money to arise from the sale, or a competent part thereof, applied in discharge of the 600*l.* and interest; or that the defendant might be decreed to make and execute to the plaintiff, and to procure all proper parties to join in making and executing to him, a good and effectual assignment of the leasehold premises, by way of mortgage, for securing to the plaintiff the repayment, with interest, of the principal sum of 600*l.*

The defendant, by her answer, said, that the complainant had agreed to lend and advance to her the whole of the 3,000*l.* for five years, at the rate of 5 per cent. per annum, on the security of the leasehold houses and premises, it being at that time, or previously thereto, distinctly stated to the complainant by William Oliver, and agreed to by the complainant, that the complainant could not inspect the lessor's title to the same; and that the complainant expressly agreed to waive whatever right he might otherwise have had to such an inspection; and that he would lend and advance to the defendant the sum of 3,000*l.* upon the security of her title as lessee thereof only. And she further said, that her solicitors took all the necessary steps for evidencing her title to the leasehold houses, and did everything that was requisite for establishing the same, and giving reasonable satisfaction thereof to the complainant. That she had always been and still was desirous to have the agreement carried into execution, which she submitted to the judgment of the court she was entitled to have done.

On the part of the defendant, the evidence of William Oliver was read, and he deposed, that in negotiating for the loan;
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[*82] *he stated to the plaintiff, that the property which he proposed to mortgage was held by her on lease direct from the owners of the freehold, and that their title could not be inspected. To which the plaintiff replied, that if the property was of sufficient value, he would be satisfied with such security; and that a few days afterwards the plaintiff told witness, that, in consequence of the report of the value which he had obtained from a person he had employed, he was willing to lend the defendant 3,000*l.* for five years, on this security, and that the plaintiff expressed himself satisfied with the proposed security, without investigating the title to the freehold.

Mr. *Roupell* for the plaintiff:—We ask that the defendant shall perform her agreement, by giving a mortgage, on receiving the difference between 600*l.* and 3,000*l.* She must show that the leases are valid leases; but she refuses to produce the landlord's title. The plaintiff is a purchaser *pro tanto*. The master may inquire into the title, and if the defendant shall be found to have a good one, the plaintiff is ready to advance the whole sum. But the plaintiff offers the alternatives, that the 600*l.* shall be repaid to him, or that the leases shall be sold.

Mr. *Knight* for the defendant:—The defendant has always been ready to repay the 600*l.* and interest. It has been satisfactorily proved, by the depositions of the witness Oliver, that the plaintiff agreed to lend the money without investigating the lessor's title to the freehold.

Mr. *Knight* then read from Oliver's deposition, that a Mr. Allwood suggested the propriety of the plaintiff having an [*83] acknowledgment of the 600*l.*, and drew up a *memorandum, the substance of which was:—"Received of Mr. Bass 600*l.*, part of the sum of 3,000*l.* agreed to be lent by Mr. Bass for five years, at five per cent. interest, to Mrs. Clivley, on the security of the five houses," and which the deponent signed.

The MASTER OF THE ROLLS (after stating the prayer of the bill):—Now that there was an agreement is distinctly made out,

 1829.—*Barnham v. Munn.*

but no such agreement as that stated in the plaintiff's bill has been proved. The witness, Oliver, has distinctly deposed, that the plaintiff was not to require the landlord's title; the plaintiff, therefore, can only have a specific performance of the agreement as proved, he cannot have a decree for the sale of the property, to raise the 600*l.*, nor for a mortgage for that amount. If he does not choose to have the agreement performed, as proved, the bill must be dismissed with costs.

Mr. Roupell elected to take the decree for specific performance.

Mr. Knight then called his Honor's attention to the defendant's answer, that the plaintiff had refused to go on with the agreement, and that the defendant was anxious to perform it.

THE MASTER OF THE ROLLS :—Then the defendant must have her costs. The plaintiff does not obtain the decree he asks, that he should inspect the lessor's title. The court is of opinion, that that was not part of the agreement; and if a plaintiff insists upon what he is not entitled to, whilst the defendant has been ready to perform the agreement really entered into, the defendant is entitled to costs. It is a *frequent practice to give [*84] costs against a plaintiff who has a decree,—the real question being, by whose fault were the costs incurred.

His Honor then suggested, that the better way would be for the defendant to repay the 600*l.* and interest, and have back her lease.

WILLIAM BARNHAM, *Plaintiff*; AND RICHARD MUNN AND ANN
HIS WIFE, *Defendants.*

Payment of Money.—Costs.

ROLLS.—1829: 17th July.

A. agreed to lend B. a loan of 600*l.*, navy five per cent. stock. He sold the stock for 522*l.*, which he paid to B. A bond is drawn by an unprofessional man, to

1829.—*Barnham v. Munn.*

repay "the sum of 522*l.*, (being the produce of 600*l.* stock, five per cent. navy, or such other sum as would replace the stock,) with lawful interest." A sum equal to the dividends was paid half-yearly; but B., on discharging the bond, refused to transfer the stock, and would only pay the money received by her; to this A. objected, but at length received it, and gave up the bond, remonstrating on the injustice of the proceedings, but being told, at the same time, that the money would only be paid in discharge of the bond.

Held, that A. had no relief in equity; he should not have received the money, unless the party paying it had agreed that the remedy should remain open; but costs were refused.

In the year 1815, the defendant, Ann Munn, (then Ann Adams, widow,) agreed to borrow of the plaintiff 600*l.* navy 5 per cent. annuities, and to pay the plaintiff the dividends thereof, until she retransferred the stock to him. The plaintiff sold out the stock, and it produced 522*l.*, which was paid over to Ann Munn, who then executed a bond for 1,000*l.*, to repay to the plaintiff the sum of 522*l.* of good and lawful money of Great Britain, (being the produce of 600*l.* stock, 5 per cent. navy, or such other sum as would replace the stock,) on the 3d day of August, 1816, with lawful interest for the same.

[*85] *The bill stated that the bond was, in order to save expense, drawn by a person not in the profession of the law, and was not, according to the terms of the agreement between the parties, which was, that the stock itself should be retransferred; and there were various circumstances stated in the bill in confirmation of it: but Mrs. Munn, after paying the dividends on the stock for many years, refused to transfer the stock, and would only pay the 522*l.*, which the plaintiff for some time refused to accept; but he, being much in want of money, at length did receive it, and gave up the bond, yet, at the time of doing so, he strongly protested against the illegality and injustice of the proceeding. The bill prayed that it might be declared that the stock should be replaced, or an equivalent paid to the plaintiff, or that a reformed and new bond might be executed to him for the difference, being 130*l.*

Mr. *Treslove* and Mr. *Presland*, for the plaintiff, proposed to read parol evidence of the agreement really made between the parties.

Mr. *Pepys* and Mr. *Koe*, for the defendants, objected to parol proof being received of an error in the instrument; but the objection was overruled.

Plaintiff's counsel then read depositions which proved that the agreement was as stated in the bill, and that 15*l.* had been half-yearly paid to the plaintiff, which was the amount of the dividend on the stock sold out; and afterwards read the deposition of Mr. Bower, the attorney of the defendants, as to what took place at the time the bond was discharged by the defendants, wherein he deposed that the plaintiff did remonstrate on the unfairness and injustice of returning the loan in money, *but that the witness told him he could only pay [*86] him 52*l.* in discharge of the bond. That the plaintiff at first refused to receive the money, but did, before he left the witness, take that sum and give up the bond; and plaintiff, whilst he was receiving the money, kept uttering his complaint as to the unfairness and injustice of returning the loan in money instead of stock, or not paying him, in addition to the aforesaid sum, the difference of price when he sold out the stock for the accommodation of the defendant, Ann Munn, and the then market price of the day of the same stock. That whilst the deponent was paying the money to the plaintiff, or immediately afterwards, deponent's partner, Mr. Lowe, came into the room, and a conversation ensued between Mr. Lowe and the plaintiff on the subject of the bond, and the amount paid in discharge of the same; when Mr. Lowe remarked, that the money could only be paid in discharge of the bond, and the plaintiff reiterated his complaint of the unfairness and injustice of not replacing the stock, or paying him the difference, until he was desired to leave the room. There was no evidence that the plaintiff was distressed for money.

The plaintiff's counsel argued, that the loan was one of stock and not of money; that the security was intended to be to re-invest the stock; that the transaction was for years treated as a loan of stock, by the annual payment of the sum equal to the dividends, and other evidence; and that, under the circumstances

in which the bond was paid and returned, there was no abandonment of the plaintiff's claim for the difference, and that the court would interpose to reform the instrument.^(a)

[*87] *THE MASTER OF THE ROLLS:—The question is, can the plaintiff now sustain the suit after he has received the money? The party should not receive, unless in doing so it is stipulated that the remedy shall remain open. I am of opinion, that, upon the evidence of Mr. Bower, this bill must be dismissed.

Mr. *Pepys* applied for costs.

MASTER OF THE ROLLS:—I cannot give costs.

(a) *Townshend v. Stangroon*, 6 Ves. 328, and *Henkle v. The Royal Exchange Insurance Co.*, 1 Ves. 317.

[*88] *BETWEEN GEORGE JACKSON, *Plff.*; AND SIR CHARLES FORBES, BARONET, THOMAS FAULKNER MIDDLETON AND CAROLINE ERSKINE, HIS WIFE, AND GEORGE JACKSON JACKSON AND JOHN ANDERSON JACKSON, ANN JACKSON AND JANE JACKSON, ALL INFANTS OUT OF THE JURISDICTION, JOHN HOPTON FORBES, ADMINISTRATOR *ad litem* OF COLIN ANDERSON, THE YOUNGER, AND OF JANE JARVIS ANDERSON, BOTH DECEASED, MATTHEW HOLE, ADMINISTRATOR OF THE PLAINTIFF'S DECEASED INFANT DAUGHTER, CAROLINE ANDERSON, AND HIS MAJESTY'S ATTORNEY-GENERAL, *Defendants*.

Will.—Construction.

ROLLS—1829: Monday, 13th July.

A testator, in the early part of his will, gave all his property amongst his four illegitimate children, a boy and three girls, subject to such regulations and legacies as he should thereafter mention. He then says: "As the whole of this estate is to be equally divided amongst the before mentioned four children, or the survivor of them, a regular division must be made of the estate when each comes of age,

1829.—*Jackson v. Gordon.*

or is married; and the share of such person is not to be considered any longer as belonging to the public stock, but to the particular person so coming of age, if a boy; when the girls, or any one of them, come of age or get married, I hereby direct that their shares may be so settled on themselves during their lives, and on their children, in equal proportions after their deaths; that it will not be in the power of the husband, if so inclined, to injure either his wife or children." The testator then proceeds: "Should it be the will of Almighty God to take one or more of these children unto himself, the share or shares of such children dying without issue are to be equally divided amongst the survivors; but, in case of issue, these children are to inherit the share of their parents amongst them equally; and, in case they die without issue, it is to return for the benefit of the survivors of those four children, or their families: upon the reversion of any sum to the public stock, the issue of a deceased child is to have the share which its parent would have had."

Held, that the boy, on attaining twenty-one, took an absolute interest in his share.

Held, that the daughters took for life, with remainder to their issue.

Held, that on either daughter dying without issue, her share would go to the survivors of the four children, in like manner as their original shares.

COLIN ANDERSON, by his will, dated the 25th October, 1802, disposed of his property as follows: "I desire that my house and grounds in the island of *Coolabah, together [*89] with my household furniture, horses and liquors, may be sold at public outcry to the highest bidder, and the produce placed to the credit of my estate. On the 1st of January, 1802, I shall have assets in India to the amount of 19,000*l.* sterling, running on at interest with mercantile houses; (therein mentioned,) and I am entitled to a further division of prize money. There is one boy at home named Colin Anderson, born on or about the 25th October, 1788, now at school at Glasgow, and boarded with Mr. John M'Arthur there. There is one girl in India, named Jane Jarvis Anderson, (since deceased,) born at Poondamalie, near Madras, on the 2d October, 1797. There is one girl in India, born at Mangalore, on the 21st September, 1800, named Anne Nesbitt Anderson, the late wife of the plaintiff. There is _____ in India, born at Coolabah, on the _____ (meaning the defendant, Caroline Erskine Anderson.) To those children, or the survivors of them, and their heirs, I leave the whole of my property in equal divisions, subject to such regulations and legacies as I shall hereafter mention." The testator, then, after giving a legacy and an annuity

to the mother of three of the children, and giving annuities to his father, mother, brother and sisters, proceeds as follows: "To provide for the legacies and the education of my children, my executors are hereby directed to place the whole of the estate securely at interest, either on landed property or in some public funds; (those of the India Company, perhaps, as safe as any;) but I leave the choice entirely to my executors, in whose regard for the interest of the children I have implicit confidence; and yearly, after the regular payment of the legacies and the expenses of the children, any remaining balance is to be added to the principal, for the benefit of the whole. As the annuitants die, the principal producing such annuity is to revert to the [*90] common stock, for the benefit of the whole. *As the whole of this estate is to be equally divided amongst the before-mentioned four children, viz., Colin Anderson, jun., Jane Jarvis Anderson, Anne Nesbitt Anderson, and , or the survivor of them, a regular division must be made of the estate when each comes of age, or is married, and the share of such person is not to be considered any longer as belonging to the public stock, but to the particular person so coming of age, if a boy; subject, however, to the control of my executors, their heirs or assignees for nine years more, when he will have arrived at years of discretion, if ever. When the girls, or any one of them, become of age, or get married, I hereby direct that their shares may be so settled on themselves during their lives, and on their children in equal proportions after their deaths, that it will not be in the power of their husbands, if so inclined, to injure either their wives or children; and my executors, their heirs and assignees, are hereby supplicated to take every possible precaution against so distressing an event. Should it be the will of God to take one or more of these children unto himself, the share or shares of such children dying without issue are to be equally divided amongst the survivors; but in cases of issue, these children are to inherit the share of their parents amongst them equally, and in case of their dying without issue, it is to return for the benefit of the survivors of those four children or their families: upon the reversion of any sums to the public

stock, the issue of a deceased child is to have the share that its parent would have had if living. But, again, if such issue die without issue, the whole of its original and after shares revert to the common stock. And I hereby constitute, nominate and appoint my beloved brothers Lieutenant Alexander Anderson, Patrick Anderson, Lieutenant-Colonel Lacklan M'Quarie, and Charles Forbes, of Bombay, *Esquire, executors of [*91] this my last will and testament," The testator afterwards made a codicil to his said will, whereby, amongst other things, he directed his house and land to be sold, and he gave various legacies to certain persons therein mentioned, and then proceeded as follows: "Messrs. Forbes and Co. of Bombay, receive the interest half-yearly of the three notes into which the opposite sum of 32,000 rupees is divided or opposed in the name of each child at 9 per cent. per annum, until they can place it out to more or equal advantage in the funds of the honorable East India Company. I wish these sums to continue accumulating until such progressively shall amount to 8,000*l.* sterling, the expenses of maintaining and educating these children, in the meantime, to be defrayed by me or at my expense. The reason why I have made this separate provision for these three children is, that they may be independent of me in case I should marry and have more children; but in the event of my death without an increase of family, my will will show the manner in which I wish whatever property I may die possessed of to be distributed, including the opposite 32,000 rupees, with its interest. I have paid for a cornetcy for Colin Anderson, jun., in his Majesty's nineteenth regiment of light dragoons, on the 29th of September, 1802: of course, in case of my death, an equal amount of my property, with the interest from that day, will be credited to each of the girls, and the remainder then equally divided amongst the four children, or the survivors of them, agreeably to the tenor of my will.

"1803, January 1. Lodged in the treasury of Bombay of the East India Company, 32,000 rupees, as a loan at eight per cent., the interest payable in Bombay half-yearly, for the sole use

[*92] and benefit of the under-mentioned *children, and in the proportions set down opposite to their respective names.

Jane Jarvis Anderson	13,600
Ann Nesbitt Anderson	10,245
Caroline Erskine Anderson	8,155

Bombay rupees, 32,000"

The testator died in 1804, leaving his children, the said Colin Anderson, Ann Nesbitt Anderson, Jane Jarvis Anderson, (since deceased,) and Caroline Erskine Anderson, the residuary legatees named in his will and codicil; and Charles Forbes proved the will in the Prerogative Court of Canterbury. Colin Anderson attained the age of twenty-one, and was of the age of thirty years when the first bill was filed on the 26th day of May, 1819. In May, 1819, Ann Nesbitt married the plaintiff, George Jackson, and previously thereto, marriage articles were executed, whereby the plaintiff covenanted to vest in trustees all such moneys as she might be entitled to of the estate of the testator, upon trust to pay the dividends to her for life, then upon trust for the children, as Jackson and wife, or the survivor should appoint; and in default of appointment, in trust for the children of the marriage, with survivorship, and accruer amongst them; and if there were no children, upon trust for such persons as the wife should by her will appoint. The original bill, in which Mrs. Jackson, formerly Ann Nesbitt, was joined with her husband as plaintiffs, prayed that the rights of all parties in the residuary estate and effects of the testator might be ascertained, and the share of Ann Nesbitt transferred into the names of the trustees of the marriage settlement, and that the dividends that had accrued due of her share might be paid to the plaintiff.

[*93] *Caroline Erskine Anderson, with the approbation of the court, married the defendant, J. F. Middleton, and articles of settlement were entered into with the approbation of the master: the plaintiff and his wife had five children. Jane Jarvis Anderson died an infant unmarried. In Easter term,

1825, the plaintiff and his wife filed their supplemental bill against the Attorney-General, stating the illegitimacy of Colin Anderson, the son, and that he had departed this life without leaving any next of kin.

Letters of administration to both Jane and Colin, the son, were, with the consent of the Attorney-General, granted to the defendant, J. Hopton Forbes. Ann Nesbitt died in November, 1827, having previously made her will, whereby, pursuant to the power given to her by her settlement, she gave her property to her husband, the plaintiff, in case her children should not live to attain twenty-one; the plaintiff took administration to his wife's effects.

Mr. Roupell and *Mr. Garratt* for the plaintiff:—The question in the case is, what interests and rights the four illegitimate children of the testator took in his residuary estate? and we submit that they took an interest for life, or, if a greater interest, that it was an interest vested, subject to be divested in the event of their dying without issue; and it is in particular the question with respect to the share of Colin Anderson, one of those children: we contend that he did not take an absolute interest in the fourth part of the estate of the testator, although he attained the age of twenty-one years, and that his share on his death without issue reverted to the common stock. The share of Jane Jarvis fell into the general fund: she died before Colin. In the former part of the will the testator used words which would seem *at first to give to his son Colin, on his attaining [*94] the age of twenty-one, an absolute interest; but these words followed: "subject to such regulations and legacies as I shall hereafter mention." In the subsequent part of the will he says, "In case of issue, these children are to inherit the share of their parents among them equally; and in case of their dying without issue, to be divided amongst the survivors." The testator has clearly shown his intention to be, that the interest Colin was to take, even in the event of his attaining twenty-one, was an interest subject afterwards to be divested, in the event of his dying without issue. Now, the mode of construing an instru-

ment of this sort, where in the will itself there is contained contradictory clauses which cannot be reconciled, is, that the last clause shall have effect; and in this case, in the first part of the will the testator seems to have given an absolute interest, and in a subsequent part he appears to have had an intention to qualify it. The rule of construction will give effect to the latter part of the will. The rule is so laid down in Lord Coke's 1st Institute, 112 B. "Here, by (&c.), is to be understood, as well devises of chattels real or personal, as of freehold and inheritance: also, that in one will, where there be divers devises of one thing, the last devise taketh place; *cum duo inter se pugnancia reperiuntur in testamento, ultimum ratum est.*" There may be a seeming repugnance in this will, and, upon the principle laid down in Coke, the latter part of the will is to prevail. In the case of *Sims and Doughty*,^(a) a question arose upon their being repugnant clauses in the will. The Master of the Rolls there says, "I know of no rule, but by taking the subsequent words as an indication of a subsequent intention: the court is in a dilemma, and cannot act at all unless they do that." In *Galland v. Leonard*,^(b) the [*95] court said, "Undoubtedly, if the successive *clauses of a will are irreconcilable, the rule is to give effect to the last clause, on an idea that the testator may have altered his intention." In an early part of the will before the court, in which it is supposed the testator may have given an absolute interest, he has qualified it by saying that it is subject to such regulations and legacies as he should thereafter mention; and the language of the subsequent part of the will limits the interest which the parties are to take. Then there is another question which arises in this case upon the codicil relative to the cornetcy, which the testator had purchased for his son Colin, on which we contend, that the amount of what the testator paid, together with interest from the time he advanced the payment, should also be credited in three parts to the three girls. It should be stated to the court that a settlement was made on the marriage of the plaintiff with Ann Nesbitt Anderson: that settlement has not

(a) 5 Ves. 247.

(b) 1 Swanst. 163.

conformed exactly to the testator's intentions; but it is not now intended to raise any question respecting it, the object of the suit being to take the judgment of the court with respect to the interests of these parties under the will, and the events that have happened.

Mr. *Rose* for the Attorney-General.

Sir Charles Wetherell appeared for Mrs. Middleton.

Mr. *Treslove* and Mr. *Millar* for other defendants.

THE MASTER OF THE ROLLS:—The interest on the 4,000 rupees, the price of the cornetcy, must be calculated from the death of the testator and not from the time of payment. I am clearly of opinion that the share of the boy vested at twenty-one, and that the words of the will which apply to the survivorship are necessarily confined to the girl's shares. *It [*96] is true that if two parts of the will are plainly inconsistent with each other, the court is necessarily driven to adopt the latter part of the will as expressing the real intention of the testator; it must necessarily presume, where there is that inconsistency, that he meant that which he has last expressed; but the most rational rule of construction is, that it is never to be inferred, if it can be avoided, that the testator meant to make inconsistent provisions in his will; and the object of the court is to reconcile, if it can, the whole will. Applying that principle to this will, it appears to me to have been the intention of the testator, that the boy on attaining twenty-one should take an absolute interest; but with respect to the daughters, that they should take for life only, and their issue after their deaths. The early part of the will expresses only an intention to give his whole property to these four children, subject to the regulations after mentioned. It is plain, therefore, that he did not mean to give his whole property absolutely to these four children, but that he meant to introduce some qualification of that absolute interest; and you must look, therefore, at the second part of the will, in order to see what was the qualification he had in his mind

in making the former part of his will. The words are, "As the whole of the estate is to be equally divided amongst the before mentioned four children or the survivor of them, a regular division must be made of the estate when each becomes of age or is married." Now, "when each becomes of age or is married," you must apply to that expression the construction *reddendo singula singulis* when the boy comes of age, or when the girls come of age or are married, "and the share of such person is not to be considered as any longer belonging to the public stock, but to the particular person so coming of age, if a boy." The words, therefore, are express, that if the particular person so [*97] coming of age is *a boy, then his share is no longer part of the common stock, but becomes his absolute property.

Then he introduces words, of which it is difficult to understand the meaning: "Subject, however, to the control of my executors, their heirs and assigns, for nine years, when he will have arrived at years of discretion." What sort of control a court could impose on this absolute vested gift it is very difficult to conceive. The testator has not expressed himself in a manner that would authorize any interference on the part of the court; but the question does not arise, it being admitted that he did attain thirty. "When the girls, or any of them, become of age or get married, I hereby direct that their shares may be settled on themselves during their lives, and on their children in equal proportions after their deaths, that they may not be in the power of their husbands." Here the testator has qualified the interest of the daughters to an interest for life, giving the remainder after the life interest of the daughters to their children. And he proceeds to state, "Should it be the will of Almighty God to take one or more of these children unto himself, the share or shares of such children dying without issue are to be equally divided amongst the survivors." Now, to make the will wholly consistent, this must be the meaning: if those daughters should die without issue, then the share of the daughter so dying without issue is to go amongst the survivors of the four children; and the same idea is to be pursued throughout the remaining expressions, which are to be understood in precisely the same manner. The only circumstance that created the least doubt in

my mind upon this construction was this, "The share is to return for the benefit of the survivors of those four children or their families." But here, again, we must consider the construction *reddendo singula singulis* to the boy according to the nature of his original interest, namely, *an absolute [*98] vested interest; but with respect to the daughters, according to the nature of the interest given in the original shares to the daughters and their families, and would not depend upon the daughter's surviving the person whose share should happen so to devolve to the survivor or survivors. Upon the whole, therefore, I think it very clear here that Colin Anderson was absolutely entitled to the original share, and to the accruing share, and that if he were illegitimate, and died without issue, it necessarily follows that the crown is now entitled.

It is impossible to make this will consistent or rational but by giving the boy a vested interest, and applying this expression with respect to the issue of the girls, and that is done without the least violence whatever: the testator meant that the daughters should take only for their lives, and that they should take it as a provision for their protection against any improper conduct on the part of their husbands, and that after their death, it was to go to their children. I must declare that Colin Anderson took a vested interest in his original share at twenty-one. I am also of opinion, that upon the death of Jane Jarvis, one of the children, he took a vested interest in one-third of her share, the other two daughters being then alive, and that the other two-thirds of her share went to the other two daughters for their lives only; with remainder to their issue, in the same manner as the will disposes to the daughters of their original shares.

July 17th.—Mr. Roupell and Mr. Garratt called his Honor's attention to a point in the minutes which the parties had not been able to settle, as to the rate of interest to be payable on what the testator had laid out in the purchase *of a [*99] cornetcy for his son Colin. The testator's property bore

Indian interest for a time, and at the testator's death it was actually vested in India, and continued there some time afterwards.

The MASTER OF THE ROLLS inquired how long the property remained in India; but there was no distinct evidence of the time it remained there after the testator's death: it was brought home for the purpose of being divided, and the estate was administered in this country. His Honor declared that he could not, in the absence of evidence, give more than four per cent., the interest of the court. His Honor afterwards added, that he could not intend that if this money had not been applied to the purchase of the cornetcy, it necessarily would have been employed in India, and have produced Indian interest.

The minutes of the decree, so far as they refer to the principal points of the case, are as follows: Declare that, according to the true construction of the testator's will, Jane Jarvis Anderson, Ann Nesbitt Anderson and Caroline Erskine Anderson, the three residuary legatees, who were girls, were in no event to take more than an interest for their respective lives; but that Colin Anderson, one of the residuary legatees, who was a boy, was to take an absolute vested interest on attaining his age of twenty-one years; declare, that while all the residuary legatees continued under age and unmarried, the residue of the testator's estate formed an aggregate fund, out of the interest whereof they were to be maintained and educated, and that the surplus interest, after paying the expenses of their maintenance and education, was to be invested and added to the principal, for the benefit of the persons who should be eventually entitled thereto: and declare, that the late defendant, Colin Anderson, upon attaining *his age of twenty-one years, became absolutely entitled to one-fourth part of the aggregate fund, and all subsequent interest and accumulation thereof; but in computing such fourth part, he is to be charged with the sum which the testator paid for a cornetcy for him, with interest thereupon from the death of the testator, at the rate of four pounds per cent., according to the direction of the testamentary paper relating thereto: and declare, that the remainder of the aggregate fund, after

deducting such the fourth share of the said Colin Anderson, continued, until the death of the said Jane Jarvis Anderson, to be one aggregate fund, out of the interest whereof she and the two other residuary legatees, (the late plaintiff, Ann Nesbitt Jackson, then Ann Nesbitt Anderson, and the defendant, Caroline Erskine Middleton, then Caroline Erskine Anderson,) were to be maintained and educated; and that the surplus interest thereof, after paying the expense of their maintenance and education, was to be invested and added to the principal, for the benefit of the persons who should eventually be entitled thereto: and declare, that upon the death of the said Jane Jarvis Anderson, under the age of twenty-one years, and without having been married, the said Colin Anderson became further absolutely entitled to one third part of the third share, in which she had a life interest, of and in the said remaining aggregate fund, and that the residue of such aggregate fund still continued, until the marriage of the said late plaintiff, Ann Nesbitt Jackson, to be one aggregate fund, out of the interest whereof she and the said defendant, Caroline Erskine Middleton, then Caroline Erskine Anderson, were to be maintained and educated; and that the surplus interest of such remaining aggregate fund, after paying the expense of such maintenance and education, was to be invested and added to the principal, for the benefit of the persons who should eventually *become entitled thereto: and declare that, upon [*101] the marriage of the late plaintiff, Ann Nesbitt Jackson, then Ann Nesbitt Anderson, she became entitled for her life, for her separate use, to the interest of one moiety of the said then remaining aggregate fund; and that the other moiety thereof continued till the marriage of the said defendant, Caroline Erskine Middleton, then Caroline Erskine Anderson, to be a trust fund, out of the interest whereof she was entitled to be maintained and educated; and that the surplus of such interest, after paying the expenses of her maintenance and education, was to be invested and added to the principal, so as to form an aggregate fund, for the benefit of the persons eventually entitled thereto: and declare, that on the marriage of the defendant, Caroline Erskine Middleton, then Caroline Erskine Anderson, she became entitled for her life, for her separate use, to the interest of the

said then remaining aggregate fund : and declare, that on the death of the late plaintiff, Ann Nesbitt Jackson, the share of the testator's residuary estate, to the interest whereof she became entitled for her life as aforesaid, and the subsequent interest and accumulations thereof became, under the trusts of the said will and codicils, divisible, in equal shares, among her surviving children and the legal personal representatives of her deceased children, but subject as to the plaintiff, George Jackson's beneficial interest in the shares of his deceased children, as their father and sole next of kin, to such claims, if any, as the surviving children of the late plaintiff, Ann Nesbitt Jackson, may have under her marriage articles, as to which the court reserves the consideration thereof until after the master shall have made his report : and declare, that the share and interest which so vested as aforesaid in the said Colin Anderson, deceased, with the accumulations thereof, now belong to his Majesty, subject to the payment thereof of the costs and expenses *incurred by the said defendant, John Hopton Forbes, in taking out letters of administration to the said Colin Anderson, the younger, and Jane Jarvis Anderson *ad litem*. And let the master inquire how much of the clear residue belongs to his Majesty, and how much to the plaintiff, George Jackson, as administrator, with the will annexed of his late wife, Ann Nesbitt, in respect of the interest and accumulations of the share to which she was entitled for her life, and how much thereof belongs to her surviving children, and the representatives of her deceased children, in respect of the principal of such share, and the interest and accumulations thereof since her death, and how much thereof belongs to the said defendant, Caroline Erskine Middleton, in respect of the by-gone interest and accumulations of the share to which she is entitled for her life, and how much thereof is the principal of such share.

1829.—Jerningham v. Herbert

JERNINGHAM v. HERBERT.*

[*103]

Scotch Heritable Bond.—Heir at Law.

WESTMINSTER HALL.—1829: 11th July.

A., being entitled to a Scotch heritable bond, devised it with other property.

The heritable bond does not pass, but descends to the heir at law.

It is immaterial that there is also a personal obligation.

The debt still retains its real character as the *ius nobilitatis*.

MRS. ANN FRANCES MIDDLETON, by her will, gave the sum of 30,000*l.*, of which 5,000*l.* was lent by her on the estate of George Johnstone, Esq., on mortgage. A reference having been made to the master, to inquire what was the nature of this security, he made a report thereon, of which the following is the effect:—

George Grant, of Leaston, in the constabulary of Haddington and county of Edinburgh, merchant in London, by his bond bearing date the 5th of August, 1779, bound himself, his heirs, executors and successors, to infest Mary, his wife, in an annuity of 500*l.* sterling, to commence at the time of his death or bankruptcy, furth of his lands of Leaston, Plewland Hill, and others therein mentioned. And by an instrument, of the same date, the said George Grant enfeoffed his said wife in the said annuity upon his said lands. George Grant sold the lands to George Johnstone; and it was agreed that the latter should retain 10,000*l.* of the purchase money, as a capital to answer the said eventual annuity, and which sum was, by the disposition of the lands, declared to be a real burden or charge thereon; and it was therein recited that Mr. George Johnstone should give a personal bond, over and above making it a real burden. The said George Johnstone, by his bond bearing date the 2d day of March, 1802, and registered in the books of Session 19th day of October, 1807, after reciting the said heritable bond, became bound to pay the interest of the said sum of 10,000*l.* to the said George Grant during the joint lives of him and the said Mary Grant, or *until [*104] she should become entitled to the annuity, and to pay the said capital sum itself to the said George Grant, his heirs or successors, at and upon the decease of the said Mary Grant; which

obligation, so far as respected the principal or capital sum, was subsequently renounced and discharged by the said George Grant. George Grant and Mary Grant, by deed executed on the 5th of October, 1807, and ratified by her on the same day, conveyed to J. Cassin, G. Smith and James Bellamy, their heirs, executors or assigns, the interest of the said sum of 10,000*l.*, and all the right and possession of him, (George Grant, from and after the term of Martinmas, 1807, during the joint lives of him and the said Mary Grant, and also the said eventual annuity of 500*l.*, during the life of the said Mary Grant, from the decease or bankruptcy of the said George Grant. George Johnstone, by his heritable bond and disposition in security, bearing date the 26th September, 1807, registered in the books of the Court of Session the 23d of October, 1807, bound himself to pay to the said Cassin, Smith and Bellamy, and the survivor of them and his heirs, the sum of 10,000*l.*, as principal, within three months after the death of Mary Grant, with interest from her death. He conveyed to them, in real security, the said lands, for the payment of the same sum, and interest, from the death of the said Mary Grant.^(a) These gentlemen were trustees for Robert Foster Grant, Esq.; and by disposition and assignment in April, 1809, duly registered in May, 1809, they made over to him, his heirs and assigns, the aforesaid eventual [*105] annuity of 500*l.*, *payable as aforesaid, and the interest of the said principal sum of 10,000*l.*, during the joint lives of the said George Grant and Mary Grant, and also the principal sum itself, payable as aforesaid, at the death of the said Mary Grant, and the interest thereof, and the said lands in security.

R. F. Grant, by his disposition and assignment, bearing date the 23d day of December, 1809, executed in London, and registered in the books of the Court of Session in Edinburgh, the 17th February, 1810, in consideration of the sum of 10,000*l.*, to him paid by the testatrix, gave, granted, alienated and disposed to the

(a) The following passage occurs in this instrument:

"And further declaring that the aforesaid personal obligation, and the said conveyance in security, were and should be deemed consistent; and it should be competent to the said persons to operate payment, by virtue of either of the said securities or both, and by personal and real diligence on either or both, without innovation or confusion of rights."

testatrix, and her heirs and assigns, the said annuity of 500*l.* sterling, to which he had right upliftable furth of all and sundry the lands of Leaston and Plewland Hills, and other lands; and he assigned to her generally all his right in the obligation for payment. And the said R. F. Grant did thereby assign, convey and dispose from him and his heirs and successors, to the testatrix, the interest of the sum of 10,000*l.*, from Martinmas, 1809, during the joint lives of the said G. Grant and M. Grant, or until she became entitled to the annuity, together with the security for the payment thereof, and the bond of George Johnstone, surrogating and substituting the testatrix in his right and place. And R. F. Grant did grant, alienate and dispose to the testatrix, her heirs and assigns, heritably all the said lands, and all the right which he had thereto, and that in real security for the payment of the said principal sum of 10,000*l.* within three months after the decease of the said Mary Grant, and interest from her death. And R. F. Grant bound himself to enfeoff the testatrix of the said lands by double enfeoffments; and for effecting the enfeoffment, he assigned to the testatrix the said sum of 10,000*l.* and interest, together with the said heritable bond and *dispo- [*106] sition in security granted by the said George Johnstone, and the instrument of seisin following thereon, substituting the testatrix in his place; and she was afterwards duly enfeoffed. The said George Johnstone, then residing in Hanover square, in the county of Middlesex, executed, in London, a bond or obligation, bearing date the 31st of March, 1810, unto the testatrix, to secure to her the payment of the interest of the sum of 10,000*l.* half yearly, during the joint lives of the said George Grant and Mary Grant, or until the right of the said Mary Grant to the said annuity, secured by the said bond of 2d March, 1802, took place. And in the margin of the bond is the following note or memorandum, signed by the testatrix:—"15th August, 1814. Received of the Countess St. Antonio, as the executrix of the late George Johnstone, Esq., the sum of 5,000*l.*, in part payment and discharge of this bond; and the further sum of 107*l.* 5*s.*, being for all interest on the 10,000*l.* to this 15th August, 1814, and for which I have given also a stamp receipt.

(Signed)

A. F. MIDDLETON."

 1829.—*Jerningham v. Herbert*

Upon these facts the master found that the sum of 5,000*l.*, part of the said capital sum of 10,000*l.*, was paid off to the testatrix in her lifetime, by the Countess St. Antonio, the executrix of the said George Johnstone, in part discharge of the securities for the same; and that the interest on the remaining 5,000*l.* was paid to the said testatrix or her committees by the countess, to within one quarter of the time of her death. And that, upon due consideration of the said instrument, and considering the said sum of 5,000*l.* remaining due thereupon to the testatrix,—was, by the law of Scotland, real estate belonging to the testatrix at the time of her death, and that the same was secured by the several instruments before stated; and that as the same, by the law of Scotland, did not pass by the will or codicils of the testatrix, [*107] the *same was then vested in the defendant, Hastings Nathaniel Middleton, as the heir at law of the testatrix, for his own use and benefit. When this cause came on for further directions, it was referred back to the master to inquire and certify, “Whether, by the law of Scotland, the testatrix, either in her own name or in the names of the obligees, had a right of personal action against the obligor or his executrix, either in respect of the bond, bearing date the 2d day of March, 1802, or the bond, bearing date the 26th day of September, 1807, and to inquire whether George Grant and Mary, his wife, were living at the time of the testatrix’s death, and if she survived her husband, and if now living, or when she died.”

The master reported that, by the law of Scotland, the testatrix, either in her own name or in the name of the obligees, had such right of personal action in respect of either bond. That report was made upon the following opinion of John Hope, Esq., the Solicitor-General of Scotland, and Mr. Moncrief of the Scotch bar:—

“There can be no doubt that the party in the right of an heritable bond, has a right of personal action against the debtor or grantor of the bond and his executors and representatives, for payment of the sum for which the heritable security is granted. The real or heritable security is added, for the safety of the credi-

tor, to the personal obligation of the debtor; and when a debt is so secured, important consequences follow in regard to the succession of the creditor's interest in the bond. But the circumstance that the creditor has obtained real security for the payment of his debt, in no degree alters the right to demand payment in a personal action against the debtor or his representatives."

The master also reported that it appeared by an affidavit sworn on the 18th December, 1828, that the *said [*108] George Grant was then alive; that the testatrix died on the 3d day of November, 1823, and Mary Grant, on the 5th of December, 1823.

Mr. *Treslove* and Mr. *Bird* for the heir at law:—It seems by the opinion of the gentleman of the Scotch bar that a personal action lies upon every heritable bond; the master has found that it was real estate, and descended to the heir at law, with a right to personal action. In the case of *Willock v. Ouchterlony*, in the House of Peers, 1772, cited in *Glover v. Strothoff*,^(a) it was affirmed by the decree of the House, that heritable bonds could not pass unless they were disposed of *inter vivos* by the proper deed of disposition, according to the laws of Scotland; but the case to be relied on is that of *Johnstone v. Baker*, reported in a note to the case of *The Duchess of Buccleugh v. Hoare*.^(b) In that case a heritable bond was given, to a moiety of which the testator therein had become entitled, and he, by his will, devised all his real and personal estate upon the trusts therein mentioned. And he directed that all his property and securities for money in Scotland should, for the purposes of his will, be considered as personal estate, and passed to his trustees as far as he could by his will affect the same, as if the same were his personal estate in England. A case was laid before the Lord Advocate of Scotland, who thereupon stated his opinion to be, that the will of the testator was ineffectual for conveying the heritable debt in question; but that the same did, on the death of the testator, descend to his heir at law. The master thereupon reported, that the herit-

(a) 3 B. C. C. 33.

(b) 4 Madd. 474.

able bond did not pass by the will, but descended to his heir at law. And Sir William Grant, Master of the Rolls, decreed accordingly. In that case, also, there was a right of personal action. The only case against us appears to *be that of *The Duchess of Buccleugh v. Hoare*. In that case an English bond was given, and the Scotch securities were only collateral; and, under the special circumstances, it was there decided that the debt was personal property. That is not the case now before the court; and the bond, we conceive, descends to the heir at law. The third bond is an English bond; but that is only a bond securing the interest.

Mr. *Pepys* for the administrators:—If the Scotch bond were given originally, then it is real estate, but if collaterally, it is not so. All the cases decide that heritable bonds as such do not pass by an English will. The case of *Johnstone v. Baker*, decided by Sir William Grant, related to a purchase of a heritable bond; but we are the purchasers of the 10,000*l.* Grant was unable to make a title to the estate to the extent of the annuity of 500*l.* a year granted to his wife, whereupon Johnstone, the purchaser, reserved 10,000*l.* of the purchase money, and gave a bond.

Mr. *Treslove*:—It was provided by the conveyance itself that the 10,000*l.* should remain in the hands of Johnstone as a real burden. Mrs. Middleton took an assignment of it by Scotch securities.

Mr. *Pepys* resumed:—The bond in 1802, was a bond to pay the 10,000*l.*: it is a mere debt, and not an interest in land. In 1807, George Grant assigned the 10,000*l.* to trustees for R. F. Grant; and in 1810, the transaction took place between the testatrix and R. F. Grant. Under which class of cases does this case fall? In one case it does not pass by will; in the other case, where the Scotch security is collateral to the debt, [*110] then it does. This being, I submit, *within the case of the *Duchess of Buccleugh and Hoare*, is part of the personal estate, and passed by the will.

Mr. *Richards* followed:—It has been decided that when an

English security is given, it passes as personal estate. Mr. Johnstone's executrix, the Countess of St. Antonio, paid off a part of the bond, and in the margin is written a receipt for 5,000*l.* in part. Now if the countess paid off a part of this bond as executrix, there was personal liability; and having paid a portion, could the countess have justified a refusal to pay the remainder? Mr. Johnstone and his executrix made themselves personally liable; and where there is that responsibility, it comes within the case of the *Duchess of Buccleugh* and *Hoare*.

Mr. *Rose* and Mr. *Lynch* for the legatees:—The master has certified that there was a right of personal action for the money against Mr. Johnstone. The security is a personal obligation, adding only the incident of a Scotch security and the enfeoffment of a heritable property; it is a personal obligation with a security binding his heir: in the case of *Johnstone v. Baker*, the parties were domiciled in Scotland. We are entitled to consider this as personal property of Mrs. Middleton, and to deal with it according to her will.

Mr. *Treslove*:—This is the case of a man who does not pay the purchase money, and that in England is a real burden upon the land. A bond to a man, his heirs and successors, must of necessity be realty: it is similar to a rent charge in this country.

THE MASTER OF THE ROLLS (after adverting to the bond of 1779, and the assignment to trustees for Mr. Robert Foster Grant):—Mr. *George Johnstone executed a new [*111] heritable bond to the trustees for Robert Foster Grant, and in that new heritable bond he made a real burden on the estate, of the 10,000*l.* to be paid within a certain term after Mrs. Grant's death; but he did not in that security make it a real burden upon the estate, that the interest should be paid during the joint lives of Mr. and Mrs. Grant.

This heritable bond, like the former one, contained also the personal obligation of Mr. Johnstone.

By the disposition and assignation, which bears date two years afterwards, namely, the 3d of May, 1809, those trustees assigned to Mr. Robert Foster Grant, their *cestui que trust*, the benefit of all the securities. Mr. Robert Foster Grant, being thus entitled to all these securities, he, by a deed dated the 23d of December, 1809, assigned them to the late Mrs. Middleton; and she, therefore, stood precisely in the same situation as the trustees of Mr. Robert Foster Grant had. Mr. Johnstone executed a bond to Mrs. Middleton, bearing date, 31st March, 1810, whereby Mr. Johnstone engaged to pay to Mrs. Middleton, the interest of the sum of 10,000*l.* half-yearly, during the joint lives of the said George Grant and Mary Grant his wife, or until the right of the said Mary Grant, to the said annuity, secured by the said bond of the 2d March, 1802, took place. This was an English bond; and of consequence, all the interest that she derived under this English bond, would necessarily pass by her will.

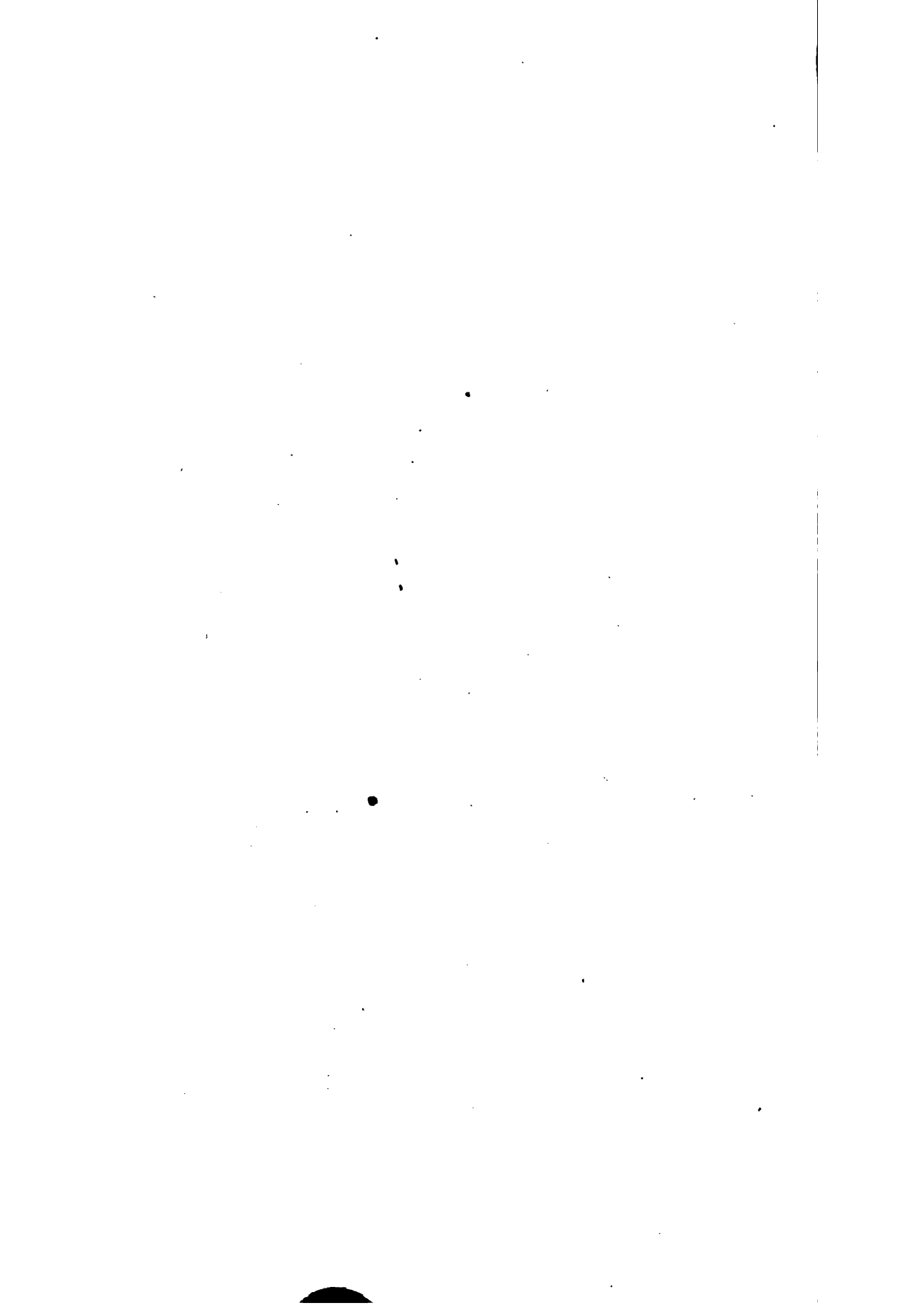
(His Honor here referred to the opinion of the Solicitor-General of Scotland, and Mr. Moncrief, who is now a judge of the Court of Session.)

I have looked into the Scotch law upon the subject, [*112] and I now entertain a clear opinion upon it. *Heritable bonds, it seems, usually contain, not only a charge making the same a real burden upon the estate, but also a personal obligation. The question to be considered is, whether this personal obligation alters the nature of the property, so as to give it to the personal representative, in the place of its passing as a heritable bond to the heir at law? Now upon that point there is no doubt upon examining the Scotch authorities. It is there expressly stated, especially in Mr. Erskine's Institutes, that if there be a personal obligation supervening, as the term is in the Scotch law, the heritable bond, that the heritable bond will carry with it the personal right, as being *jus nobilius*, and consequently, it still continues a heritable bond, and will descend to the heir,(a)

(a) Though movable sums are rendered heritable by the creditor's securing them on land, yet an heritable debt is not changed into movable by an accessory movable security: *ex. gr.*, a gift of single escheat, or by a second movable bond, cor-

and will not pass by an English will. I am, therefore, of opinion, that, except as regards the interest secured by Mr. Johnstone's bond, to Mrs. Middleton, of the 31st March, 1810, Mrs. Middleton's will does not affect this property; and that the right to the heritable bond descends to the heir.

roborating the first heritable one; (Pr. Falc. 43;) because the supervening security is not only an accessory to the heritable debt, but it is the weaker right, which, therefore, ought not to draw the *jus nobilius* after it. And, indeed, there is no ground to presume, in such case, an intention in the creditor to alter the condition of the debt; for his obvious and only meaning is to secure the payment of it. Neither does the demand of payment, by a creditor in a heritable debt, though made judicially, afford any presumption of an intention to change the nature of it to movable, but rather to employ his money, when recovered from the present debtor, upon another heritable security, more to his liking, or perhaps on a purchase of land. Ersk. Inst. 186.



REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

*BURLTON AND OTHERS, ASSIGNEES, &C. v. WALL, [*118]
CLERK.

*Bankruptcy.—Effect of superseding a Commission as to One of
Four.—Vendor and Purchaser.—Exceptions.*

ROLLS.—1829: 27th July.

A commission was issued against two partners. Subsequently a commission was issued against one of them and three other persons. This latter commission was then superseded as to the partner who was included in the first commission, without prejudice as to the other three bankrupts. The assignees under the second commission sold an estate belonging to one of the three partners; the purchaser objected, that the second commission was altogether void, but the court held otherwise, and made a decree for specific performance.

JOHN MORRIS being seised in fee of the lands in question, a commission of bankrupt, bearing date the 30th of March, 1826, was issued against Thomas Coleman, the said John Morris, John Beebee Morris and Thomas Morris, bankers, dealers and chapmen, on which they were declared bankrupts, and the plaintiffs were chosen assignees. In that character the plaintiffs, in July, 1827, contracted to sell the lands to the defendant.

Previously to this commission, and on the 29th March, 1826, a commission was issued against Thomas *Coleman, [*114] and one Edward Wellings, under which they were declared bankrupts.

On the 16th April, 1828, Thomas Coleman and the plaintiffs, presented a petition to the Lord Chancellor, in the matters of the two bankruptcies, praying that the commission against Thomas Coleman, John Morris, John Beebee Morris, and Thomas Morris, might be superseded as against Thomas Coleman, without affecting the validity of such commission as to either of the other bankrupts, or the certificate of either of them. On the 10th May, 1828, this petition came on to be heard, when the Vice-Chancellor superseded the commission as against Thomas Coleman, his estate and effects accordingly, without prejudice to the validity of the commission as to the others, or their certificates; and the proofs of the debts under that commission against the separate estate of Thomas Coleman, were ordered to be transferred to the commission issued against Thomas Coleman and Edward Wellings, and to stand part thereof. The bill stated the preceding facts, and prayed for specific performance.

The defendant, by his answer, said, that he was ready to perform the agreement upon having a good title made to him; but he had not hitherto performed the same, on account of the doubts which he was advised existed with respect to the complainant's title, especially as concerned the validity of the commission of the 30th of March, 1826, as against the said John Morris, John Beebee Morris and Thomas Morris, and their estate and effects, regard being had to the previous existence of the commission of the 29th March, 1826, notwithstanding the said order of *superseas*.

The usual reference was made to the master, who reported that a good title could be made.

[*115] *To that report the defendant excepted. The exception, and a petition of the plaintiffs for confirming the master's report, came on to be heard this day.

Mr. *Bickersteth* and Mr. *Wigram*.:—Here are two commissions against Coleman. The second commission was void from the beginning. The purchaser is a willing one, yet it is the duty of

his counsel to show, that the title is not a good one. A second commission, whilst the former is subsisting, is void, *Ex parte Bullen*(a) and *Ex parte Thompson*.(b) In the case of *Ex parte Crew*(c) the Lord Chancellor Eldon held, that if a joint commission issue against persons, one of whom has been declared a bankrupt under a separate commission against him, the joint commission is a nullity, one of the parties being already a bankrupt under a prior commission against him. Another question is, can anything subsequently done do away with the effect? *Re Coleman*.(d) It has been established in a case at law, that a certificate under a second commission is not an answer to an action, *Till v. Wilson*;(e) and that case was decided since the passing of the last bankrupt act.(g) The sixteenth section of that act only meant that where a commission issued against partners or others being valid, the court might supersede it as to one, leaving it unaffected as against the others; those others being persons against whom a commission might originally have issued. If this be an invalid commission the assignees have no power to convey.

Mr. *Rose* and Mr. *Beames*.—The other side contend that the second commission was void, and that nothing could be *subsequently done to make it good: but if that be law, [*116] Lord Hardwicke and Lord Eldon must have mistaken the law; for they frequently superseded the first, when a separate commission, in order to let in a second, being a joint commission. A commission of bankrupt is in the nature of an execution at law. In *Ex parte Rawson*(h) Lord Eldon gave effect to a second joint commission; for whatever may be the case at law, the Chancellor sitting in bankruptcy will do what is most necessary to effect the purposes of justice. If the proposition be right, that a second commission is void, then no *supersedeas* of the first could

(a) 1 *Rose*, 136.

(b) 1 *Rose*, 285.

(c) 16 *Ves.* 236.

(d) 1 *Montague & M'Arthur*, 15.

(e) 7 *Barn. & Cress.* 684; and see *Ex parte Brown*, 1 *V. & B.* 60.

(g) 6 *G. IV.*, c. 16, s. 16.

(h) 1 *V. & B.* 160.

establish it; but it was decided in *Ex parte Bygrave*(a) that a joint commission against two should be superseded as to one, and that was a virtual decision that the commission was good as to the other. In *Ex parte Pryce*(b) Lord Eldon decided that the commissioners ought to proceed under the several commissions, since it was unknown to them which would be ultimately available.

With respect to the case of *Till v. Wilson*, the sixteenth section of the last bankrupt act was not adverted to, and Lord Tenterden there said, "we are not called upon to decide what will be the effect of superseding the first commission; it is sufficient for the present case to say, that upon the authorities and opinions referred to, we are of opinion that the second commission is a nullity, inasmuch as there is nothing upon which it can operate, all the bankrupt's property being vested in the assignees under the first commission."

A second commission is void only by reason of the existence of the first commission; on the first being *superseded, the second becomes good, and, therefore, this exception must be disallowed.

Mr. *Bickersteth* in reply:—The question here is, can the plaintiffs make a valid legal title? The Lord Chancellor may direct the proceedings of a previous commission to be impounded, and a subsequent commission to be proceeded in. And if the certificate of the bankrupt were questioned at law, the Lord Chancellor might interfere by injunction to protect the bankrupt; but that is a consideration different from what should govern the court on the present occasion. The plaintiff is entitled to a legal title, and is not bound to take a title which can only be protected by injunction. The second commission is invalid, and no subsequent act can establish it. The first commission is going on, and, therefore, the proceedings cannot be impounded.

(a) 2 Glyn & J. 391.

(b) 2 Glyn & J. 161.

1829.—Burton v. Wall.

July 28th.—THE MASTER OF THE ROLLS:—I am of opinion that I must make a decree for specific performance of the contract.(1) The argument is, that the sixteenth section of the act of 6 G. IV, was intended only to apply to cases of valid commissions, and that it was not meant to apply to cases where the commission was invalid, because a prior commission had issued against one of the

(1) It is a matter of discretion in the court, whether or not to decree a specific performance; not dependent, however, upon the arbitrary pleasure of the court, but regulated by general rules and principles. *Rogers v. Saunders*, 4 Maine Rep. 92. When a contract in writing is certain, fair in all its parts, is for an adequate consideration, and is capable of being performed, it is a matter of course for a court of equity to decree performance. *Ib.* The performance may, in a proper case, be decreed, where the party has lost his remedy at law. *Ib.* But negligence, in the performance of contracts, is not thereby to be encouraged; and the party seeking performance must show that he has not been in fault, but has taken all proper steps towards performance on his own part, and has been ready to perform. *Ib.* Where the binding efficacy of a contract has been lost at law by the lapse of time, a court of equity will grant relief, where time is not of the essence of the contract. *Ib.* A written agreement concerning lands may be enforced in equity, although binding only on the party to be charged. *Ib.* The court will not compel a specific performance, where the remedies are not mutual, and where the party who is not bound lies by to see whether it will be a gainful or a losing bargain, to abandon it in the one event, and in the other to consider lapse of time as nothing, and claim a specific performance. *Ib.* A bill for a specific performance, by a vendor against a purchaser, is not to be dismissed upon the mere ground that the vendor's title was not perfect at the time of filing the bill. *The Dutch Church in Garden street v. Moll*, 7 Paige, 77. A specific performance may be decreed if it appears, by the master's report, that the vendor is in a situation to give a perfect title, except where the purchaser has been materially injured by the delay. *Ib.* A party having an equitable title by a contract, complete in all its parts, is entitled to a specific performance of course. *Buchannon v. Upshaw*, 1 Howard, 84. The specific performance of an agreement is not a matter of right, which a party can demand from a court of equity, but is a matter resting merely in the sound discretion of the court. *Tibey v. The County of Bristol*, 3 Story's Rep. 800. Equity views a bond conditioned to convey land as articles of agreement, and will decree a specific performance of the condition. *Fitzpatrick v. Beatty*, 1 Gilman's Rep. 454. A party cannot compel the specific performance of a contract in a court of equity, unless he shows that he himself has specifically performed, or can justly account for the reason of his non-performance. *Scott v. Shepherd*, 3 Gilman's Rep. 483. If a party seeking to enforce a specific performance wishes to set off, against the amount to be paid by him, an indebtedness to him from the other party, he should lay the proper foundation for it in his bill, or he cannot be relieved. *Ib.* A bill in equity, to enforce the specific performance of a contract, must show a complete performance of all the stipulations on the part of the complainant to entitle him to a decree. *Church v. Jewett*, 1 Scammon's Rep. 54.

bankrupts. Now, if I were to give any opinion on that point, I should say that the reason of that provision in the act was for the very purpose of giving validity to the commission, which, in its origin was not valid, by enabling the Lord Chancellor to supersede the commission as to one person; and, therefore, I am far from adopting the argument; but, however, that might be, I should find a very great difficulty here in refusing this specific performance, for the objection is actually removed by [*118] the *Vice-Chancellor's order under this very commission, for he superseded this commission as far as it regards Coleman, and the commission therefore is a good commission not only in equity, but at law. The argument used on the part of the purchaser is, that the Vice-Chancellor had no authority to do this; that the act did not apply to such a case; but I never could determine that the Vice-Chancellor had committed an error: it would in fact be a rehearing of the Vice-Chancellor's order, and I should in such case direct the party to go to the Lord Chancellor if I entertained any doubt about it. I have no authority to reverse the Vice-Chancellor's order to supersede; and, therefore, if my opinion were other than it is, I could not decide in favor of the exception; all that I could do would be to send it to the Lord Chancellor; but my opinion entirely concurs with the Vice-Chancellor. I must, therefore, decree a specific performance, and indeed without any doubt upon the question, but without costs.

Exceptions overruled, and specific performance of the agreement, without costs decreed.

Reg. Lib. A. 1828, fo. 2243.

*BETWEEN JAMES HAUGHTON LANGSTON, *Plaintiff*; [*119]
AND SIR CHARLES MORICE POLE, BART., HAUGHTON
FARMER OKEOVER, MARIA SARAH LANGSTON, CHARLES
BARTER, THE ELDER, AND ELIZABETH CATHERINE, HIS WIFE,
AND CHARLES BARTER, THE YOUNGER, AN INFANT, BY HIS
GUARDIAN, *Defendants*.

Will, Construction of.—Ambiguity.

ROLLS.—1829: 28th July.

J. L., by his will, devised his manors to trustees, upon trust, to convey the same to his son, J. H. L., for life; with remainder to trustees, to preserve contingent remainders; with remainder to the *second* and other younger sons of J. H. L., in tail male.

There was no limitation to the first son of J. H. L., but the declaration of the trust of the term contained a provision to raise money for the daughters on failure of issue male of the body of J. H. L. The will also provided, that in case J. H. L. should have any children other than and besides an eldest or only son, then J. H. L. might raise money for the portion of younger sons or daughters.

Held, that the true construction of the will was, that the first son should have an estate tail male in reversion after the death of his father.

THIS suit was instituted to decide a question on the will of John Langston of Sarsden House, in the county of Oxford, Esquire, bearing date the 28th of July, 1801, whereby he gave all his manors and lands unto and to the use of trustees upon trust, so soon as his son (the plaintiff) should attain twenty-one years, to convey, settle and assure the same as follows: To the use of the plaintiff and his assigns for life; remainder to trustees, to be named in the settlement, to preserve contingent remainders; with remainder to the use of the *second*, third, fourth, fifth, and every other son of the plaintiff in tail male in succession; with remainder to testator's second and other sons successively in tail male; with remainder to trustees for 500 years, upon the trusts thereafter mentioned; with remainder to *the [*120] plaintiff's daughters in succession in tail general; with remainder to trustees for ninety-nine years; with remainder to testator's eldest daughter in strict settlement, and divers remainders over. The trusts of the terms of 500 years and 99 years were declared as hereinafter stated in the case laid before the

1829.—Langston v. Pole.

judges of the Court of Common Pleas. And the trustees were directed to give in the settlement similar powers, if any of his daughters should become tenants for life, to raise portions for their younger children. And the bill alleged that it was the testator's intention that his will should contain a direction that the settlement directed by his will to be made should contain a limitation to the plaintiff's first son in tail male, immediately after the limitation to trustees, during the life of the plaintiff, to preserve contingent remainders, and immediately before the limitation to the second son of the plaintiff; and that the testator accordingly gave instructions to his solicitor to prepare a will containing a direction to insert such a limitation in the settlement so directed to be made. And in pursuance of such instructions, a draft of his will was accordingly prepared; and such draft contained a direction that such a limitation should be inserted in the will, but in the engrossment of the will executed by the testator, such direction was omitted to be inserted by the mistake or carelessness of the person who engrossed the will from the draft; the plaintiff, however, submitted that the will contained within itself sufficient evidence of the testator's intention being that the settlement so directed to be made as aforesaid should contain such a limitation as before mentioned in favor of the plaintiff's eldest son in tail male.

The bill prayed that the will and codicils might be established, and the trusts thereof, as far as respected *the settlement and conveyances of the manors, messuages, lands, tenements, hereditaments and real estate of the testator, devised to the defendants Sir. C. M. Pole and H. F. Okeover, and their late deceased co-trustee, might be carried into execution by a settlement and conveyance to be made by the defendants, Sir Charles Morice Pole and Haughton Farmer Okeover, of the same manors, messuages, lands, tenements, hereditaments and real estate, to the uses, upon the trusts, and for the intents and purposes, and with, under and subject to the powers, provisoes and declarations, to, upon, for, with, under and subject to which the same were by the will directed to be settled and conveyed, or as near thereto as the deaths of persons, or the circumstances

of the case, would permit; and especially that in making such settlement and conveyance, a limitation might be inserted therein, whereby the said manors, messuages, lands, tenements, hereditaments and real estate might be limited, settled and assured to the use of the plaintiff's first son in tail male in remainder, immediately after the limitation to the use of trustees during the life of plaintiff, to preserve contingent remainders, and immediately before the limitation to the use of the plaintiff's second son in tail male.

Sir Charles Morice Pole, Bart. and Haughton Farmer Okeover, by their answers, said they believed that it was the testator's intention that his will should contain a direction that the settlement, so directed to be made as in the bill mentioned, should contain such limitation in favor of the eldest son of the plaintiff in tail male, and believed that the testator accordingly gave instructions to his solicitor to prepare a will containing a direction to insert such limitation in the settlement so directed to be made; and that, in pursuance of such instructions, a draft of a will was accordingly prepared, and that such *draft contained [*122] a direction that such a limitation should be inserted in the settlement so directed to be made; and these defendants believed that in the engrossment of the will executed by the testator, such direction was omitted to be inserted by the mistake or carelessness of the person who engrossed the will from the draft. They further said, they had been advised and believed that the will contained within itself evidence of the testator's intention being that the settlement so directed to be made should contain such a limitation in favor of the plaintiff's eldest son as in the bill mentioned, but they submitted the same to the opinion of the court.

The other defendants, Maria Sarah Langston, a tenant for life in remainder, Charles Barter and Elizabeth Catherine, his wife, another tenant for life in remainder, and Charles Barter, the younger, the infant, first tenant in tail in remainder, by his father and guardian, stated in their answers to the same effect.

This cause came on to be heard before the Master of the Rolls on the 28d day of February, 1826.

Mr. *Shadwell* and Mr. *Atherley* for the plaintiff.

Mr. *Horne* and Mr. *Wray* for the defendants, tenants for life in remainder, and for the first tenant in tail in remainder.

Mr. *Purvis* for defendants, the trustees.

LORD GIFFORD, then MASTER OF THE ROLLS, made an order that a case be made out for the opinion of his Majesty's justices of the Court of King's Bench; and it was ordered that the question be, "Whether Henry Langston, the first son of the [*128] testator's son, James Haughton Langston, *takes any estate under the said testator's will?" And all proper facts necessary to bring the matters into question were to be stated in the said case. And his Lordship also ordered that it be referred to the master in rotation to settle the case, if the parties differed about the same. And the justices were to be attended with the case.

In pursuance of this order the following case was made:—
"John Langston, late of Sarsden House, Oxfordshire, Esquire, now deceased, by his will, dated 28th July, 1801, gave and devised all his freehold and copyhold manors, messuages, farms, lands, tenements, tithes and hereditaments in the counties of Oxford and Middlesex, or elsewhere in England, with their appurtenances, (except as therein mentioned,) unto and to the use of his son, James Haughton Langston, and his assigns during his life, without impeachment of waste, with remainder to the use of trustees and their heirs during the life of the said James Haughton Langston, in trust to preserve contingent remainders; with remainder to the use of the *second*, third, fourth, fifth, and all and every other the son and sons of his (the said testator's) said son, James Haughton Langston, lawfully to be begotten, severally, successively and in remainder one after another, as they and every of them should be in seniority of age and priority of birth,

and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body to be always preferred and to take before the younger of such son and sons, and the heirs male of his and their body and bodies issuing; with remainder to his testator's second and other sons successively in tail male; with remainder to the use of other trustees for the term of 500 years upon *certain trusts thereafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of his said son, James Haughton Langston, successively in tail general; with remainder to the use of other trustees for the term of ninety-nine years, upon the trusts thereafter mentioned, with remainder to the use of testator's eldest daughter, Maria Sarah Langston, and her assigns for life, without impeachment of waste; with remainder to the use of trustees during the life of the said Maria Sarah Langston, upon trust to preserve contingent remainders; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the testator's said daughter successively in tail male; with remainder to other trustees for the term of 600 years upon the trusts thereafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the said M. S. Langston successively in tail general; with remainder to the use of the testator's daughter, Elizabeth Catherine Langston, and her assigns for life, without impeachment of waste; with remainder to the said trustees during the life of the said Elizabeth Catherine Langston, to preserve contingent remainders; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the said Elizabeth Catherine Langston successively in tail male; with remainder to the use of other trustees for the term of 700 years, upon the trusts thereafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the said E. C. Langston, lawfully begotten successively in tail general; with remainder to the use of the testator's daughter, Caroline Langston, and her assigns for life, without impeachment of waste; with

remainder to the use of trustees during the life of the

[*125] *said Caroline Langston, to preserve contingent remainders; with remainder to the use of the first, second, third, fourth, fifth, and all and every other son and sons of the said Caroline Langston, successively in tail male; with remainder to the use of other trustees for the term of 800 years, upon the trusts thereafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the said Caroline Langston, successively in tail general; with remainder to the use of the testator's daughter, Agatha Maria Sophia Langston, and her assigns for life, without impeachment of waste; with remainder to the use of the said trustees to preserve contingent remainders; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the said A. M. S. Langston, successively in tail male; with remainder to the use of other trustees for the term of 900 years, upon the trusts thereafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the said A. M. S. Langston, successively in tail general; with remainder to the use of testator's daughter, Henrietta Maria Langston, and her assigns for life, without impeachment of waste; with remainder to the said trustees for the life of the said H. M. Langston, to preserve contingent uses; with remainder to the first, second, third, fourth, fifth, and all and every other the son and sons of the said H. M. Langston, successively in tail male; with remainder to the use of other trustees for the term of 1,000 years, upon the trusts thereafter mentioned; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of the said H. M. Langston, successively in tail general; with remainder to the said testator's sixth and other daughters, thereafter to be born, successively

[*126] *in tail general; with remainder to the use of other trustees for the term of 1,500 years, upon the trusts thereafter mentioned; with remainder to the use of Sarah, the wife of Peter Cazalet, Esq., in fee. And said testator did, by his said will, declare, that the said term of 500 years was upon trust that the trustees thereof, in case there should be no

son of the body of his said son, James Haughton Langston, should, by mortgage or sale of the premises comprised in said term, raise money for additional portions and for maintenance as therein mentioned. And said testator did, by his said will, declare, that the said term of ninety-nine years was upon trust that the trustees thereof, in case there should be no son of the body of his said son, James Haughton Langston, should levy and raise such sum and sums of money for portions as therein mentioned. And said testator did, by his said will, declare, that the said term of 600 years was upon trust that the trustees thereof, in case there should be no son of the body of his (said testator's) said son, James H. Langston, should raise such sum and sums of money for portions as therein mentioned. And the said testator did, by his said will, declare, that the said term of 700 years was upon trust that the trustees thereof, in case there should be no son or daughter of the said J. H. Langston, should raise such sum and sums of money for portions as therein mentioned. And the said testator did, by his said will, declare, that the said term of 800 years was upon trust, that the trustees thereof, in case there should be no son of his (testator's) said son, J. H. Langston, should raise such sum or sums of money for portions as therein mentioned. And said testator did, by his said will, declare, that the said term of 900 years was upon trust, that the trustees thereof, in case there should be no son of his (said testator's) said son, J. H. Langston, should raise such sum and sums of money for portions as therein mentioned. And *the said testator did de- [*127] clare, that the said term of 1,000 years was upon trust, that the trustees thereof, in case there should be no son of the testator's said son, J. H. Langston, should raise such sum and sums of money for portions as therein mentioned. And said testator did, by his said will, declare that the said term of 1,500 years was upon trust, that the trustees thereof, in case there should be no son of the testator's said son, J. H. Langston, should levy and raise such sum and sums of money as therein mentioned, for the purposes therein also mentioned. And in the said testator's will is contained a power or proviso, authorizing his, the said testator's said son, J. H. Langston, from time to time, during his life, in case there should be any child or children of his, the said

1828.—Langston v. Pele

J. H. Langston's, body lawfully begotten, other than and except an eldest or only son, to charge portions as therein mentioned. And in said will is contained a proviso, that in case the testator's said son, James Haughton Langston, should die under the age of twenty-one years, and there should be no son or daughter of his body living at his decease; or, being such, if all such sons should die under twenty-one years of age, and all such daughters should die under that age and unmarried, then the trustees of the said will should be possessed of certain stocks or funds therein mentioned, upon the trusts therein contained.

The said John Langston, the testator, departed this life in February, 1812, leaving the said James Haughton Langston, his only son and heir at law, (then a minor,) and several daughters, him surviving, having previously made three codicils to his said will, the last of which bears date in December, 1811, but none of them making the least variation, or in any manner affecting the above mentioned limitations of his real estates

[*128] *The said James H. Langston attained the age of twenty-one years in May, 1817, and has since that time intermarried, and has issue by his wife, two sons, viz., "Henry Langston, *his eldest or first born son*, and Edward Langston, *his second born son*."

In Easter term, 1827, the case was argued before his Majesty's justices of the Court of King's Bench, by Mr. Shadwell for the plaintiff, and Mr. Horne, for the defendants; and they (after having considered the same) certified that they were of opinion that the said Henry Langston, the first son of the said James Haughton Langston, did not take any estate under the said will.

After this certificate of the judges of the King's Bench, the cause came on to be heard before Sir John Leach, who had then become Master of the Rolls, on the 17th March, 1828, and Mr. Pepys and Mr. Knight, for the plaintiff; Mr. Horne and Mr. Wray, for the defendants, except the trustees; Mr. Purvis, for the trustees. His Honor directed a case to be made for the

opinion of his Majesty's justices of the Court of Common Pleas; and it was ordered that the question should be, "Whether Henry Langston, the first son of the testator's son, James Haughton Langston, takes any *and what* estate under the said testator's will?"

James H. Langston had not, in fact, any sons, and the statement that he had sons was made, in both cases, in order to raise the question at law.

A case was accordingly stated, which set forth the will much more fully than it was stated in the case laid before the Court of King's Bench; to insert it here would perhaps be considered unnecessary, and, *therefore, only some of the [*129] amplifications will be noticed.

This case thus begins:—"John Langston, Esquire, was, at the time of making his will hereinafter mentioned, and at his death, seised, in fee simple, of divers manors, messuages, lands, tenements and hereditaments, situate in the counties of Oxford and Middlesex, and duly made and published his last will and testament in writing, bearing date the 28th July, 1801, which was executed and attested in the manner by law required to pass freehold estates by devise; and he thereby gave and devised all his manors, messuages, farms, lands, tenements and hereditaments, situate and being in the several counties of Oxford and Middlesex, or elsewhere in England, except his shares in the New River Company, unto John Pollexfen Bastard, Esquire, John Williams Hope, Esquire, and Charles Morice Pole, Esquire, (now Sir C. M. Pole, Bart.,) their heirs and assigns, to the uses after mentioned, (that is to say,) to the use of the said testator's son, the said plaintiff, James Haughton Langston, for and during the term of his natural life, without impeachment of waste;" with remainder to the uses stated in the former case, set out much more fully.

In this case the trusts of the several terms of years limited by the will are set out so much more extensively than they were in the former case, that it has been deemed necessary to make some

extracts, first with regard to the term of 500 years; "and the said testator, by his said will, did declare that, as for and concerning the said term of 500 years, by his said will limited as aforesaid, the same term was limited unto the said trustees thereof, their executors, administrators and assigns, upon trust that in case there be no son of him, the said plaintiff, James [*130] Haughton Langston, nor no future son of his, the said *testator's own body, or there being any such son or sons, if he and they should all die without issue male before any of them should attain the age of twenty-one years, and there should be two or more daughters of the body of his, the said testator's said son, the said plaintiff, J. H. Langston, then they, the said trustees and the survivor of them, and the executors, administrators and assigns of such survivor, should, after the decease of his (the said testator's) said son, the said plaintiff, James H. Langston, and such failure of issue male of his body, and of his, the said testator's own body as aforesaid, by mortgage or sale, or other disposition of all or any part of the premises comprised in the said term of 500 years, or by the rents and profits thereof, or by any ways or means whatsoever, levy and raise such sum and sums of money for the portion and portions of all and every such daughter and daughters, (other than and besides an eldest or only daughter,) as thereafter mentioned, (that is to say,) [In trust to raise portions for daughters as therein mentioned] and containing also the following passage:—"But nevertheless the payment of the same portion or portions shall be postponed until the end of twelve calendar months next after the decease of him, my said son, and failure of issue male of his body and my body as aforesaid; and then the portion or portions shall be payable with interest for the same, after the rate of 4*l.* by the year for each sum of 100*l.*, from the time of the commencement of the said term of 500 years in possession."

The trusts of the term of ninety-nine years were declared to be, that in case there should be no son or daughter of the body of the plaintiff, nor no future son of testator's body, or there being any such sons or daughters, the sons should die without issue male, and the daughters without issue before they attained their

ages of twenty-one years, then after the decease of the plaintiff and failure *of issue as aforesaid, to raise sums [*181] for the benefit of testator's youngest daughters therein named, and as therein mentioned. The trusts of the term of 600 years are to be carried into execution in the same events, with this in addition; "and in case there should be no son of the body of his daughter, Maria Sarah Langston, or there being any such son or sons, if he and they should all die without issue male, before any of them should attain the age of twenty-one years, and there should be two or more daughters of his daughter, M. S. Langston, then, after the decease of plaintiff and M. S. Langston, and such failure of issue as last aforesaid, to raise portions for her daughters as therein mentioned."

The provision for younger sons, as set forth in the second case, is in the following words:

"And the said testator thereby also provided and directed, that it should be lawful for the said plaintiff, from time to time during his natural life, in case there should be any child or children of his body lawfully begotten *other than and besides an eldest or only son*, by any deed or deeds, instrument or instruments in writing, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, with or without power of revocation, or by his last will and testament in writing, to be by him signed, sealed and published in the presence of and attested by three or more credible witnesses, to charge all or any part of the said manors, messuages, farms, lands, tenements, tithes and hereditaments thereinbefore devised, with and for the raising and payment of any principal sum or sums of money, not exceeding in the whole the gross sum of 25,000*l.*, for the portion or portions of any one, two, or more of the younger son or sons, or daughter or daughters of the body of him, the said plaintiff, lawfully to be begotten, born in *his lifetime, or [*182] within due time after his decease, to be paid and payable unto and to vest in such younger son or sons, or daughter or daughters respectively, at such time or times, and in such shares and proportions, with such clauses of survivorship, and in

1829.—*Langston v. Pole.*

such manner as he, the said plaintiff, should by such deed or deeds, instrument or instruments in writing, or last will and testament, to be executed and attested as aforesaid, direct, limit and appoint. And also to charge the same premises, or any part thereof, with or for the payment of any sum or sums of money yearly or otherwise, as he should think fit, for the maintenance of *such younger son or sons, or daughter or daughters*, from the time of his death until such portion or portions respectively should become payable, not exceeding the interest of such portions after the rate of 4*l.* per cent. per annum."

In Michaelmas Term, 1828, this case was argued before his Majesty's justices of the Court of Common Pleas, by Mr. Serjeant Taddy for the plaintiff, and Mr. Serjeant Wilde for the defendants, and those judges (after having considered the same) certified that they were of opinion, that the said Henry Langston, the first son of the said testator's son, James Haughton Langston, took an estate in tail male under the said will expectant on the decease of his father, the said James Haughton Langston.

July 28th.—The cause now coming on to be heard on further directions :

Mr. *Bickersteth* and Mr. *Wray* for the defendants, except the trustees :—The Courts of King's Bench and Common Pleas have found differently. The question is now on the devise to the testator's son for life, with remainder to that son's second and other sons, wholly omitting the first son. The testator then goes on to provide for his daughters by terms of year, and that provision [*133] is made in certain events; and by his will he declares the trusts of the term to be, that in case there shall be no son of the plaintiff, nor no future son of his own body, or there being any such son or sons, if he and they shall all die without issue male before any of them shall attain the age of twenty-one years, and there shall be two or more daughters of the body of the plaintiff, then certain sums shall be raised; so that he has made a provision for the plaintiff's daughter on failure of issue male. The argument on the other side is, that the

testator could not have meant to exclude the eldest son. Afterwards there is a provision for the children other than the eldest son. Now, these are the clauses in the will by which it will be attempted to make out that the eldest son was intended to be included in the limitation. But can the court consider the latter clauses so repugnant to the first limitation, that it will introduce a limitation to the eldest son? The proviso for the daughters is consistent with no benefit to the eldest son. It is nothing that no other provision is made for the eldest son, the will must be construed by itself. The Court of King's Bench has held that the eldest son took nothing: the Court of Common Pleas has held the contrary: it rests with this court to decide. The words used by a testator, are the words on which alone the court can act; it cannot enter into conjecture.

Mr. Pepys and Mr. Knight for the plaintiff.

Mr. Purvis for the trustees.

THE MASTER OF THE ROLLS:—Whatever may be my opinion on the subject, I shall certainly come to a decision, in order that the cause may be carried to the House of Lords. I shall, therefore, *determine in favor of the decision of the [*134] Court of Common Pleas; but my opinion is, that that court came to a right conclusion. The whole will must be looked through in order to discover the sense of the testator; and the question is, whether the testator or the drawer of the will did not, by mere mistake, omit the word "*first*." I am of opinion that it was omitted by mistake. How is the provision for the daughters, in case there should be no issue male, consistent with no limitation to the first son? It is manifest, that the testator did not mean to exclude the first son. Then follows another clause, but a stronger inference cannot be drawn. The testator, contemplating there might be several sons, gave his son a power to provide for his younger sons; yet, according to the argument, the second and younger sons were to take the whole estate.

1829.—*Topham v. Constantine*.

My opinion, therefore, is in favor of the decision of the Court of Common Pleas.

The will must be decided on according to the sum of the expressions throughout it.

Decree a conveyance to be executed, whereby an estate tail male is to be limited to the first son of the plaintiff, after the limitation to the trustees during the life of the plaintiff, to preserve contingent remainders.

Reg. Lib. B. 1828, fol. 2069.

[*135] *CHRISTOPHER TOPHAM *v.* ANN CONSTANTINE.

Vendor and Purchaser.

ROLLS.—1829: 28th July.

The plaintiff is entitled, under a prayer for general relief, to such remedy as the statement of his case entitles him to.

Where an estate has been sold to a person who has since died, the court will direct an account to be taken of the personal estate, and decree that the vendor shall have a lien on the land for so much as the personal estate will not extend to pay

THIS was a bill filed by the plaintiff against the defendant, as administratrix of Mr. Richard Constantine, for the specific performance of an agreement for sale of an estate by the plaintiff to the intestate. The bill had been amended by a charge that the title had been accepted, and that the defendants were not entitled to a reference of title; but the prayer of the bill remained as when it was first filed, and did not pray that it might be decreed that the defendant had accepted the title.

It was objected, therefore, that such a decree could not now be made; but

The MASTER OF THE ROLLS decreed that the plaintiff was entitled, under the prayer for general relief, to such remedy as the

1829.—Phillips v. Parker.

statement of his case entitled him unto, and his Honor decreed a specific performance.

The plaintiff's counsel also wished to have it decreed that he had a lien on the estate for what remained due of the purchase money; but his Honor decreed that the master should take an account of the personal estate of the purchaser, and ascertain the clear residue thereof applicable to the payment of the purchase money; and if there was not sufficient, the plaintiff was to have a lien on the land sold, for so much as should not be paid out of the personal estate.

Reg. Lib. B. 1828, fol. 2319.

*BETWEEN WILLIAM PHILLIPS AND ELIZABETH, HIS [*136]
WIFE, *Plaintiffs*; AND GEORGE PARKER, JOHN UL-
LETT, JOHN HURN DOVE, HENRIETTA DOVE, WIDOW, HEN-
RIETTA DOVE, SPINSTER, AND SARAH DOVE, *Defendants*.

Will.—Construction.

ROLLS.—1829: 21st July.

Devise of lands, subject to 1,000*l.* to be raised for the testator's daughter, to an annuity of 37*l.* 10*s.* to his widow, and to all such incumbrances as might happen to be thereon, does not exempt the personal estate from the payment of a mortgage thereon.

JOHN DOVE, by his will, dated the 23d of June, 1818, duly executed and attested, as by law is required for the devise of freehold estates, after reciting that he had, for the advancement and preferment in life of his two sons, Hargate Dove and William Dove, made ample provision and settlement for them, and that he therefore did not consider it requisite to make further provision for them, gave and devised unto his son, John Hurn Dove, his heirs and assigns, subject to the payments thereafter mentioned, and to all such incumbrances as might happen to be thereon, all that his freehold and copyhold estate, late Thomas Edwards', situate and being at Cawthorpe, in the parish of

Bourn, and other lands which the testator purchased of John Willoughby and others, and also all those freehold and copyhold lands lying in the South Fen of Bourn aforesaid, at a place called Coat Hills, subject, nevertheless, to the payment thereof, within twelve months next after his decease, of the sum of 1,000*l.* of lawful English money, in equal shares and proportions, unto his three daughters, the plaintiff, Elizabeth Phillips, Henrietta Dove and Sarah Dove; and also to the payment of the sum of [*137] *37*l.* 10*s.* yearly, and every year, unto his, the testator's wife, Henrietta Dove, as an annuity for and during the term of her natural life, to be paid as thereafter mentioned; *to hold* all and every the said messuages, lands, hereditaments and premises, subject as aforesaid, unto his son, John Hurn Dove, his heirs and assigns; but in case John Hurn Dove should die without leaving any lawful issue of his body, or leaving such issue, he, she or they should happen to die under age without leaving the like lawful issue, then the testator gave and devised all and every the same estates so given and devised unto his said son, unto his daughters, the plaintiff, and the said Henrietta Dove and Sarah Dove, their heirs and assigns, as tenants in common, and not as joint tenants. And he gave and devised unto his two friends, George Parker, Esq., and John Ullett, Esq., certain freehold and copyhold houses and lands, and all other his freehold and copyhold estates not thereinbefore given and devised, unto his son, John Hurn Dove, to hold all and every part thereof as were freehold, unto the said George Parker and John Ullett, their heirs and assigns, upon trust, as soon as conveniently might be after his decease, to sell and absolutely dispose of the freehold part of such estate for the most money and best price or prices that could be had or gotten for the same, either together or in parcels, by public auction or otherwise, as they might think proper; and as to the copyhold or customary part of such last described estates, he thereby authorized and empowered, or decreed and directed the said George Parker and John Ullett, as soon as conveniently might be after his decease, to make sale and dispose of the same either together or in parcels, by public auction or private sale as aforesaid, to and for the best price or prices that could be had or gotten for the same; and all his

horses, beast, sheep, cattle, corn, *grain, hay, straw, im- [*138]
 plements of husbandry, debts, money, and receipts for
 money, and all other his personal estate and effects, of what na-
 ture or kind soever and wheresoever the same might be, and not
 otherwise thereby given and disposed of, he gave and bequeathed
 unto the said George Parker and John Ullett, upon trust, to sell
 and dispose of such part or parts thereof as should not consist of
 money or securities for money, as soon as conveniently might be
 after his decease; and out of the moneys arising from the sale
 thereof, after paying all his just debts, funeral expenses, legacies
 and the expenses attending the provisions of that his will, first
 pay unto each of his daughters, Henrietta Dove and Sarah Dove,
 the sum of 1,500*l.* a piece; and from and after payment thereof,
 then upon further trust, to pay the residue or surplus thereof in
 equal shares and proportions unto his said daughters, Henrietta
 Dove and Sarah Dove, and the plaintiff, Elizabeth Phillips, their
 executors, administrators or assigns; and he gave and bequeathed
 the same to them, together with their shares of and in the sum
 of 1,000*l.*, thereinbefore directed to be paid to them by his said
 son, John Hurn Dove, to be paid by his executors in trust with-
 in twelve months after his decease: and he gave and bequeathed
 unto his said wife all his household goods and furniture, plate,
 linen, woollen, kitchen, brewing and dairy utensils, or such part
 thereof as she might think proper to make choice of, subject to
 the wear and tear thereof, for and during the term of her natural
 life, and from and immediately after her decease, he gave and
 bequeathed the same unto his said son, J. H. Dove, his executors
 and administrators. The testator appointed the said trustees
 executors of his will.

The plaintiffs, by their bill of complaint, claim to be entitled
 under the will to have one-third of the sum of 1,000*l.*

*raised and paid out of the estates specifically devised [*139]
 to John Hurn Dove, and that they were also entitled to
 one equal third part of the residue of the said testator's estate
 and effects. And the bill charged, that John Hurn Dove, not-
 withstanding he claimed an interest in the freehold and copyhold
 estates of the testator as heir at law and customary heir, also

claimed to be entitled to have the estates devised to him by the testator's will exonerated from all charges and incumbrances thereon, and especially from a sum of 3,000*l.* and interest charged thereon by way of mortgage.

The bill prayed that the will might be established, and the trusts thereof performed and carried into execution, by and under the direction and decree of the court; and that it might be declared that John Hurn Dove was not entitled to have the estates devised to him by the will, subject to the incumbrances thereon as aforesaid, exonerated and discharged from the mortgage of 3,000*l.* and interest, or other the incumbrances on or affecting the same. And that in case the mortgage for 3,000*l.*, or any other of the incumbrances on or affecting the estates devised to the said John Hurn Dove, should be paid or satisfied out of the personal estate of the testator, or any other part of his estate other than the estate subjected thereto as aforesaid, then that the same might be decreed to be made good out of the estate so devised to John Hurn Dove, and that the same might be raised by sale or mortgage of such last mentioned estates; and that the defendant, John Hurn Dove, might be decreed forthwith to pay to the plaintiffs, or to the plaintiff, William Phillips, in right of his wife, and to the defendants, Henrietta Dove, spinster, and Sarah Dove, in equal shares and proportions, the sum of 1,000*l.* by the will bequeathed to them, and charged on and made payable out of the estates specifically devised by *the will to John Hurn Dove, together with interest thereon from the end of twelve calendar months after the testator's decease; and that, if necessary, the 1,000*l.* and interest might be raised by sale or mortgage of the last mentioned estate, or a competent part thereof.

John Hurn Dove, by his answer, insisted that he was entitled to have the hereditaments devised to him exonerated from the principal money (3,000*l.*) due upon the said mortgage, and the interest due and to grow due thereon, and to have such principal money and interest paid out of the testator's assets.

It was on this point in the answer, that the case was discussed at the hearing.

Mr. *Pepys* and Mr. *Younge* for the plaintiffs:—The estate devised to the defendant, John Hurn Dove, is devised *cum onere*. This case differs from *Searle* and *St. Eloy*, and other cases which may be cited, inasmuch as the testator in the present case devised his estate, not merely subject to the incumbrances thereon, but subject to the incumbrances which might be thereon at the time of his decease, evidently intending to charge the devised estate for the purpose of increasing his personal estate. If the devisee of the estate be entitled to have it exonerated from the mortgage, the effect will be wholly to defeat the testator's intentions with respect to his personal estate, and deprive the parties interested in the personal estate of the provision intended for them. If the testator's intention can be regarded, no possible doubt can arise in this case.

Hancox v. Abbey(a) was cited for the plaintiffs.

*Mr. *Norton* in the same interest.

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Mr. *Barber* for the heir at law:—The mortgage is one of the testator's own creation, and a devise subject to a mortgage does not exonerate the personal estate. A devise of an estate subject to a mortgage is no more than would have been implied, and is not an exoneration of the personal estate from the payment of the mortgage. He cited the cases of *Howell v. Price*,^(b) *Searle v. St. Eloy*,^(c) *Bartholomew v. May*,^(d) *Galton v. Hancock*,^(e) *Tweedale v. The Earl of Coventry*,^(g) *Barnewall v. Lord Cawdor*.^(h)

Mr. *Pepys* in reply:—The testator devised the estate subject to 1,000*l.* and other incumbrances; that 1,000*l.* he gave by his will, and the estate must be held subject to that sum and to the mortgage. The estate being also in the same passage subject to

(a) 11 Ves. 179.

(b) 1 P. W. 293.

(c) 2 P. W. 386.

(d) 1 Atk. 487

(e) 2 Atk. 427.

(g) 1 B. C. C. 240

(h) 3 Mad. 453.

1829.—*Phillips v. Parker.*

the incumbrances which may be thereon, it is necessarily subjected as well to the mortgage as to the 1,000*l*.

THE MASTER OF THE ROLLS:—The words are “subject to the payments thereafter mentioned, and to all such incumbrances as might happen to be thereon.” The personal estate is the primary fund for the payment of debts, and there must appear a clear intent on the part of the testator to exempt that fund; it has been repeatedly decided, that a devise subject to a mortgage does not exempt the personal estate. This devise is subject to the payments thereafter mentioned, and the incumbrances that may be thereon. Now, the sums *after mentioned are 1,000*l*. and an annuity; it is hence attempted to be inferred, that the land must also bear the mortgage, but there is nothing in this case to distinguish it from the cases cited. Declare the personal estate liable in the first place.

By the decree it is declared, that the defendant, John Hurn Dove, is entitled to have the estate devised to him by the will of the testator, exonerated and discharged from the mortgage of 3,000*l*. and interest. The usual accounts to be taken of the personal estate. The personal estate to be applied in payment of debts in a due course of administration. Accounts to be taken of the freehold and copyholds. Estates devised in trust for sale. Further directions and costs reserved.

Reg. Lib. B. 1828, fol. 2309.

NOTE.—It is a general rule, that personal estate is first liable to the payment of mortgages in exoneration of the real estate mortgaged; (*King v. King*, 3 P. W. 359; *Bartholomew v. May*, 1 Atk. 487; *Searle v. St. Eloy*, 2 P. W. 358;) and next, the estate descended is liable, (*Gallon v. Hancock*, 2 Atk. 425,) unless the debts are directed to be paid out of the lands devised, (*Manning v. Spooner*, 3 Ves. 115,) and unless there be also a clear intention that the descended estates should not be subject to the payment of the debts. *Barnewell v. Lord Cawdor*, 3 Mad. 453. If there be a declaration, express words, or clear manifestation or indication upon the face of the will, that the personal estate is to be discharged from the payment of debts, the court will not disappoint the intention. *Ancaster v. Mayer*, 1 Bro. C. C. 462; *Oneal v. Mead*, 1 P. W. 693, and *Bootle v. Blundell*, 1 Mer. 193; *Watson v. Brickwood*, 9 Ves. 447. The personal estate of a son, on whom lands in mortgage descended, is not liable to the payment of the mortgage moneys. 1 Ab. Eq. 270.

1839.—Phillips v. Parker.

And the personal estate of a devisee of lands mortgaged by the deviser or his ancestors, is not liable to the payment of the mortgage money. *Shafto v. Shafto*, 2 P. W. 664, note; *Lawson v. Hudson*, 1 Bro. C. C. 58. The personal estate of the purchaser of an equity of redemption has been held to be not liable to the mortgage, (*Forrester v. Leigh*, 2 P. W. 664, note; *Tweddell v. Tweddell*, 2 Bro. C. C. 101; *Buller v. Buller*, 5 Ves. 534,) unless the intention of the purchaser appears to be to make the debt his *own. *Parsons v. Freeman*, Amb. R. 115; *Woods v. Huntingford*, 3 Ves. 132. The distinction seems to depend upon communication with the mortgagee, or some other act done by the party to make the debt his own. There is much information upon the subject in *Buller v. Buller* and *Woods v. Huntingford*. A mortgage upon a man's estate, not of his contracting, is not considered his debt, payable primarily out of his personal estate. On the other hand, a man may make a mortgage debt of his own contracting to be considered payable primarily out of his real estate, as a devise to trustees to sell and pay a mortgage thereon; but it seems that a conveyance upon trust, to sell and pay debts generally, does not exempt the personal estate. *Tait v. Lord Northwich*, 4 Ves. 816. With respect to a devise upon trust, for sale to pay debts generally, Lord Thurlow, in the case of *Hale v. Cox*, (3 B. C. C. 322,) appears to have drawn a distinction on this point, as against different characters—legatee of personal estate and next of kin—expressing an opinion in favor of an exemption of legatees from the payment of a mortgage debt under the circumstances of that case; but, in the case of next of kin, charging the personal estate with the mortgage; and in subsequent cases, (*Gray v. Minnethorpe*, 3 Ves. 103; *Burton v. Knowlton*, 3 Ves. 106; *Brummel v. Prothero*, 3 Ves. 110,) Sir Richard Pepper Arden, Master of the Rolls, recognized and acted upon the distinction, exempting the personal estate where specifically bequeathed, but subjecting it to mortgages where the personal estate went to the executor without any particular powers or appropriations; and in one of those cases the same learned judge said, he was not one of those judges who thought there was much difference between a charge for debts and a devise for payment of debts, unless there were demonstration that the personal estate was intended to be exempted.

In order to exempt the personal estate, the judge must be satisfied, on looking at the whole will, that it was the testator's intention to exempt the personal estate; and circumstances, *dehors* the will, ought not to be called in to assist the explanation; (1 Mer. 216, 220;) the judge will not look out of the will as to the state of the testator's affairs; 3 Ves. 113. In *Boole v. Blundell*, (1 Mer. 193,) the testator gave 3,000*l* to each of his daughters, and directed that his funeral expenses and legacies should be paid out of his moneys and the rents and fines then due to him. He gave the surplus to his son and daughters. The testator then devised all his manors to trustees for the term of 500 years, in trust, out of the rents and profits, to pay his debts, and the annuities and legacies thereafter mentioned. Lord Eldon held, that the personal estate was exempted from the payment of debts.

[*144] HARPER AND ANOTHER, ASSIGNEES OF BUTLER, *Plaintiffs*; AND SARAH ELIZABETH RAVENHILL AND GEORGE RAVENHILL, *Defendants*.

Husband and Wife.—Wife's Reversion in Personality.—Bankrupt.—Stamp.

ROLLS.—1829: 11th July.

The wife of a bankrupt was entitled, under the will of her grandmother, to a moiety of certain public funds on the death of her mother. Her husband became bankrupt; then the wife died; then the mother died. On a bill filed by the assignees of the bankrupt against the executrix of the grandmother and the administrator of the wife of the bankrupt:

Held, that the bankrupt having survived his wife, the assignees became beneficially entitled.

Letters of administration, under which a plaintiff makes title, must be stamped *ad valorem*.

SARAH ROEBUCK, by her will, gave to her executors 6*l.* per annum, bank annuities, and 1,481*l.* 18*s.* 1*d.*, three per cent., consolidated bank annuities, upon trust for her daughter, for her life as therein mentioned; and after her decease, to transfer the same unto and between her two grandchildren, the defendant, Sarah Elizabeth Ravenhill and Ann, afterwards the wife of James Arthur Butler, to be vested at the age of twenty-one years, or day of marriage.

The testatrix's daughter, and two granddaughters were the surviving executrices, and they proved the will.

The bill stated the marriage of the granddaughter Ann, with James Arthur Butler, his subsequent bankruptcy in 1818, and that the plaintiffs were the assignees under the commission. She died in 1820, in the lifetime of her mother, the daughter of the testatrix, leaving her husband her surviving, and letters of administration to her effects have been granted to the defendant, George Ravenhill. The bankrupt died intestate in May, 1821, and letters of administration to his effects were granted to the

1829.—*Harper v. Ravenhill*.

plaintiffs. The testatrix's daughter died in June, 1823; and the plaintiffs claimed to be entitled *to a moiety of [*145] the stock. Sarah Elizabeth Ravenhill, was the surviving executrix of the will of the testatrix, her grandmother. The stock remained in the name of the testatrix.

Mr. Ching for the plaintiffs:—All the interest of the bankrupt vested in the assignees, subject to the chance of the wife surviving him, but she died in her husband's lifetime, and upon her death, the title of the assignees became perfect; the assignees have procured letters of administration to be granted to them; the administration has been taken without stamp, because the fund is in litigation, and the amount of the assignees' interest has not been ascertained.

Mr. Rose and Mr. Beames for the defendant, Sarah Elizabeth Ravenhill:—The trustee is only anxious to pay the money to a competent authority, and the administration having been taken under 20th L., it did appear to her legal advisers that the administration did not give a sufficient authority.

THE MASTER OF THE ROLLS:—I can only make a decree when the letters of administration shall have been corrected. Letters of administration are necessary to complete the title.

Mr. Ching said, he understood that the Ecclesiastical Court, did not put a stamp when the property was in litigation, and he submitted that the court would then make the decree, putting the defendant upon terms to obtain the administration.

THE MASTER OF THE ROLLS:—I think differently, for I must protect the revenue.

*Let the cause stand for a week, with liberty to the [*146] plaintiffs to take out proper letters of administration: the assignees now must do so; for having taken upon themselves the character of administrators, they cannot now retire.

 1829.—*Munnings v. Bury*.

On a subsequent day, the administration having been perfected, the cause was again brought on, when Mr. *Barber* appeared for George Ravenhill, and contended that it was property acquired by the husband after the bankruptcy, and, therefore, did not pass under the assignment.

The MASTER OF THE ROLLS decided the contrary, holding it to be clear, that the beneficial interest passed to the assignees.

By the decree it is declared that George Ravenhill was a trustee for the plaintiffs, for one moiety of the stock, and that Sarah Elizabeth Ravenhill, should sell out the same; that the costs, charges and expenses of all parties, as between solicitor and client, should be taxed. And Sarah Elizabeth Ravenhill, after deducting her own costs, and paying the costs of the plaintiffs, and of George Ravenhill, should pay the remainder to the plaintiffs.

Reg. Lib. A. 1828. fo. 2124.

The order as to costs was an arrangement between the parties.

 [*147].

*MUNNINGS v. BURY.

Power of Attorney.—Confirmation.—Principal and Surety.

ROLLS.—1829: 15th July.

A merchant, being abroad, empowers certain persons in this country to receive moneys, adjust claims and do some other acts. Money being wanted by the firm here, of which he was a partner, these attorneys deposit the deeds with the Hope Insurance Company, to secure 12,000*l*.; and covenant that he shall execute the mortgage; this 12,000*l*. was also secured by the bonds of sureties in sums corresponding to the shares of the partners.

The power of attorney was not a sufficient authority; but the merchant, on his return to this country, having written a letter to the Hope Company, requesting the loan of 6,000*l*., "to be secured on his Essex property, which you now hold, in addition to the 12,000*l*. already advanced;" and professing his readiness to execute the mortgage deed:

Held, that this was a confirmation of the security.

Some of the parties having paid the amount of the sums secured by them:

Held, that they had a lien on the property.

One of those sureties being a partner:

Held, that the sum paid by him was subjected to the partnership accounts.

THE plaintiff was engaged in shipping and mercantile speculations with George Bridges, George Elmer and Samuel Howlett, who carried on their business at Manningtree, in the county of Essex, under the firm of Bridges & Company; and with defendants, William Rothery and Thomas Burleigh; the latter was the plaintiffs' son in law. The firm of Bridges & Company were concerned in the ship *Melantho*, and in the speculations in which she was employed, in the proportion of seven twenty-fourths; William Rothery in the like proportion of seven twenty-fourths; Thomas Burleigh in three twenty-fourths; and the plaintiff himself in the remaining seven twenty-fourths. In February, 1815, this vessel was freighted by the owners for the Cape of Good Hope, and plaintiff went out as managing owner; several other ships and vessels followed him. In 1816, the plaintiff duly executed and sent to England a power of attorney to William Rothery and Thomas Burleigh and Sally Munnings, the plaintiff's wife, to recover all sums of money, goods, wares and merchandises, effects, property, chattels, ships and vessels; and to take all requisite proceedings at law and in equity for that purpose; to adjust, liquidate and finally settle all accounts; *and upon payment or receipt, in his name, to sign, seal [*148] and deliver all such receipts, releases, acquittances and discharges, deeds or instruments as should be necessary; to compound debts and to indorse bills of exchange; to sell the ship *Melantho* and other vessels; to let and hire vessels to freight; to make insurances on ships, and generally to act for him. William Rothery was deputy chairman and a trustee of the Hope Insurance Company. The Hope Insurance Company having been applied to for a loan of 12,000*l.*, agreed to advance that sum upon a deposit of the title deeds of the plaintiff; and thereupon certain articles of agreement were prepared, bearing date the 7th November, 1817, and made between the plaintiff by the said T. Burleigh and Sally Munnings, therein described as his attorneys lawfully authorized for the purposes thereafter mentioned of the first part; the said Thomas Burleigh of the second

part; the directors of the Hope Insurance Company of the third part; and William Rothery and four others, therein described as trustees of the said company, of the fourth part, reciting the power of attorney: it is witnessed, that in consideration of the sum of 12,000*l.*, therein mentioned to be then advanced to and for the use and benefit of the plaintiff, by payment of the same into the hands of the said T. Burleigh and Sally Munnings, as his attorneys as aforesaid, plaintiff, by the said T. Burleigh and S. Munnings, delivered unto and deposited with the company the deeds and writings as a pledge and security for the payment of the sum of 12,000*l.* with interest, on the 1st of June, 1820. T. Burleigh thereby covenanted that plaintiff should, within eighteen months, execute a mortgage to secure the 12,000*l.*, interest and costs.

A receipt for the 12,000*l.* from S. Munnings and T. Burleigh was indorsed.

[*149] *As a collateral security to the company for the payment of the 12,000*l.* and interest, it was agreed that the said George Bridges and G. Elmer should procure two of their friends as sureties to execute a bond to the said trustees for securing 2,333*l.* 6*s.* 8*d.*, being two-thirds of seven twenty-fourths thereof with interest; and that S. Howlett should produce his brother as a security, to join with him in a bond for securing 1,166*l.* 13*s.* 4*d.*, being the other or remaining one-third of seven twenty-fourths thereof, with interest; and that the said William Rothery should procure two of his friends as sureties on his behalf to execute a bond for securing 3,500*l.*, being other seven twenty-fourths thereof, with interest; and that two friends of plaintiff and of the said T. Burleigh should execute a bond for securing 5,000*l.*, being the remaining ten twenty-fourths thereof, with interest, on account of plaintiff and the said T. Burleigh.

Accordingly, four several bonds, bearing even date with the articles of agreement, and amounting to the sum of 12,000*l.*, were executed to the trustees named in the articles; viz., one of such

bonds was the joint and several bond of the defendants, John Elmer and John Lewis, in the penalty of 4,666*l.*, with the condition thereunder written for making void the same if plaintiff should, within the space of eighteen calendar months, execute the bond and mortgage in the articles mentioned, or failing that event, if J. Elmer and John Lewis should pay to the said company the sum of 2,333*l.* 6*s.* 8*d.*, part of the said sum of 12,000*l.* with interest, and also with such costs as the company might incur in enforcing the performance of the said articles; and another of such bonds, was the joint and several bond of the defendants, S. Howlett and R. Howlett, in the penalty of 2,338*l.* with the like condition as aforesaid, save that the sum thereby secured was 1,163*l.* 13*s.* 4*d.*, with interest and costs *as* [*150] aforesaid; and another of such bonds was the joint and several bond of the defendants J. Adamson and R. Jackson, in the penalty of 7,000*l.*, with a like condition as aforesaid, save that the sum thereby secured was 3,500*l.*, and with interest and costs as aforesaid; and the other of such bonds was the joint and several bond of F. Stott, since deceased, to whose effects the defendant E. Stott, widow, hath taken out letters of administration, and the defendants Thomas Stott and John Burleigh in the penalty of 10,000*l.*, with a like condition as aforesaid, save that the sum thereby secured was 5,000*l.*, with interest and costs aforesaid.

The 12,000*l.* was received by Mr. Ireland, a solicitor appointed by Mrs. Munnings and T. Burleigh, and applied by him, through Rothery and T. Burleigh, in payment of the debts of the partnership.

William Rothery executed and gave to Sally Munnings and Thomas Burleigh his bond, bearing date the 4th February, 1818, whereby he bound himself in the penal sum of 2,000*l.*, with a condition thereunder written reciting the power of attorney and the articles of agreement, and that the sum of 12,000*l.* had been accordingly advanced by the said office, and that it had been agreed that the interest of the said sum of 12,000*l.*, when the same should from time to time become due, should be paid and discharged out

of the remittances which should or might be made by the plaintiff; but in the event of such remittances not arriving in due time, it had been agreed that the interest should be advanced and paid in the proportions following; (that is to say;) the interest for the sum of 5,000*l.*, part of the said sum of 12,000*l.*, by the said T. Burleigh, and Sally Munnings, on the part and behalf of the plaintiff and of the said Thomas Burleigh; the interest [*151] of the sum of 3,500*l.*, further part thereof, by *the said William Rothery; and the interest of the remaining 3,500*l.*, by George Bridges, George Elmer and Samuel Howlett, constituting the late firm of Messrs. Bridges & Elmer: but that when remittances should arrive sufficient to enable the aforesaid interest to be paid, that the several sums of money which should have been advanced and paid in the proportions aforesaid should be refunded and repaid to the said parties respectively, so far as the said remittances would extend for that purpose; and that, for the purpose of effectuating such arrangement so far as related to William Rothery, it had been agreed that he should enter into that bond with the following condition: "That if the said William Rothery, his executors or administrators, did and should from time to time, so long as the said sum of 12,000*l.*, or any part thereof, should remain due and owing to the said Hope Assurance Company, upon the security aforesaid. apply such remittances as should or might thereafter come to his hands from the plaintiff, or on his account, in paying or discharging the interest of the said sum of 12,000*l.*, or so much thereof as such remittances would extend to pay at the times when the same should become due and payable; and in the event of not receiving remittances in sufficient time for such purpose, or in case the same should be insufficient to pay the whole of the interest due, then if he, the said William Rothery, his heirs, executors, or administrators, should, out of his own proper moneys, well and truly advance and pay, or cause to be paid and advanced, unto the said T. Burleigh and Sally Munnings, their executors or administrators, within twenty-one days next after they or either of them should have paid such interest to the Hope Assurance Company, the interest of 3,500*l.*, part of the said sum of 12,000*l.*, or such part of the sum actually paid by the said T. Burleigh and

Sally Munnings, their executors or administrators, as *should be in the same proportion to the sum actually [*152] paid as the said sum of 3,500*l.* bears to the said sum of 12,000*l.*; and that in case remittances subsequently arrived and came to his hands, if he, the said William Rothery, his executors or administrators, should forthwith thereout repay to the said T. Burleigh and Sally Munnings, their executors or administrators, *pari passu* with himself and the said Messrs. Bridges and Elmer, such sum or sums of money as he, she or they, should or might have heretofore advanced and paid on account of the said interest, or so far as such subsequent remittances should extend, *then* the said bond or obligation to be void, or else to remain in full force and virtue." There was also a similar bond from George Bridges, George Elmer and Samuel Howlett to the said Sally Munnings and Thomas Burleigh, bearing date the same 4th day of February, 1821, in a like penalty of 2,000*l.*, and with a like condition; but there was no evidence to show that this bond was executed by any person but George Elmer.

The plaintiff, by his bill, charged that the sum of 12,000*l.* ought to be considered as having been received solely upon the security of the obligors in the said four several bonds to the trustees, and that the company ought to be compelled to deliver up to the plaintiff the several title deeds, evidences and writings, free from all claim and demand whatsoever of the said company; and the plaintiff charged, that he had not confirmed the security, and that all his letters to the Hope Company were conditional propositions. And the bill prayed, that the defendants might make a full, fair and perfect discovery of all and singular the matters aforesaid. And that the defendants, the trustees of the company, might be compelled to deliver up to plaintiff all the title deeds, evidences and writings of or relating to his said estates, or any of them, freed and discharged of and from all claim *and demand whatsoever in respect of [*153] the premises. And that the articles of agreement bearing date the 7th day of November, 1817, might be delivered up to be cancelled. And in case it should be held by the court that

the plaintiff was bound to pay the 12,000*l.*, or any part thereof, that William Rothery and plaintiff's other partners might be compelled to repay and make good to plaintiff the said sum of 12,000*l.* and interest, or what he should be compelled to pay of the same, or at least what he should be compelled to pay over and above his share and proportion of the 12,000*l.* as such partner as aforesaid. And that the Hope Insurance Company might be directed to hold the shares of William Rothery and Thomas Burleigh, of and in the capital stock thereof, and the dividends which had accrued or should accrue due thereon, as trustee for the plaintiff, for the purpose of reimbursing him the said sum of 12,000*l.* and interest, or what he should be compelled to pay of the same, or at least what he should be compelled to pay over and above his share and proportion of and in the same as such partner as aforesaid.

A supplemental bill stated an action brought by the Hope Insurance Company against the plaintiff, for recovering what remained due to them, in which a verdict was found for 8,008*l.*, and that judgment had been entered up for the same, and 280*l.* costs; and set forth a mortgage by plaintiff to the Hope Insurance Company for 8,478*l.*, the amount of the judgment obtained against him for damages and costs, and including 190*l.* for interest; and charged that the persons who entered into the four several bonds had no lien upon the deeds; and praying that he might be allowed to redeem on payment of the principal money and interest on such mortgage.

Samuel Howlett and Robert Howlett being called upon [*154] by the Hope Insurance Company for the sum of *1,166*l.*

13*s.* 4*d.* mentioned in the condition of the bond, and Samuel Howlett being unable to pay the same, Robert Howlett paid the principal, and Samuel Howlett a small sum for interest; and they claimed a lien on the securities in the hands of the Hope Insurance Company, as a security for the repayment thereof by the plaintiff. John Adamson and Richard Jackson had made an investment to secure the sums in their bonds.

John Elmer invested 600*l.* of the moneys secured by the bond of himself and John Lewis.

John Lewis was sued on the bond, and judgment obtained against him for the remainder.

The plaintiff returned to England in the month of October, 1821, and, on the 8th of November, 1821, wrote the directors the following letter: "Being desirous of raising a sum of money to discharge some engagements entered into by me and others, which remain to be paid, I propose to borrow a sum of 6,000*l.*, to be secured on my Essex property which you now hold, in addition to the sum of 12,000*l.* already advanced by your honorable company, and secured thereon; which security I trust you will consider to be satisfactory, you having already received in aid of the said security between 5,000*l.* and 6,000*l.*: having been abroad during the last six years in the East Indies, the mortgage deed for securing the above sum of 12,000*l.*, which I understand was sent to me be signed, never reached me. That deed I am ready to execute, and to do any act that may be considered necessary and satisfactory to you for securing the repayment of such further sum as may be agreed to be advanced.

"I am, Gentlemen,

"Your obliged humble servant,

"G. G. H. MUNNINGS."

*On the 20th November, 1821, the following letter was [*155] written by the plaintiff to the Hope Company:—

"Gentlemen:—When I had the honor to attend your board on Wednesday last, a question was proposed to me by one of the gentlemen of the board, if I should be willing to pay the balance of principal and interest due to the Hope Company, they retaining the money already received by them under the collateral bonds, on the delivery to me of the title deeds of my estates in Essex, now in your possession for securing 12,000*l.* and interest; to which I replied, that if I could accomplish it I would readily pay the balance, and that I would lose no time in considering it.

I have since weighed the matter fully in my mind, and I will engage to pay such balance on the company delivering to me my title deeds now in their possession, and executing a sufficient release. Should this be declined on the part of the Hope, I will then propose to perfect the mortgage deed already prepared for securing the Hope Company 12,000*l.* and interest, in any way that may be deemed necessary in order to make them perfectly secure, they withholding proceedings against the persons who have executed collateral bonds on my part for securing 5,000*l.*, part of the said 12,000*l.*, for such time as may be agreed upon; and also to permit Messrs. Adamson and Jackson to withdraw the 3,500*l.* paid by them conditionally in aid of the said mortgage. The above proposals are made in order to save unnecessary expense, and to enable me to exert myself to discharge the mortgage altogether, which it is my most anxious wish to do.

"I am, Gentlemen,

"Your much obliged humble servant,

"G. G. H. MUNNINGS."

The directors having refused to make a further advance, [*156] on the 27th November, 1821, the plaintiff wrote *to the directors, that being disappointed in his application to the Hope for the sum of 6,000*l.*, or to deliver to him the title deeds on his paying 5,000*l.*, which he stated was his share of the 12,000*l.*, he must decline executing the mortgage.

The Hope Company, by their answer contended that they had a lien on the deeds for 12,000*l.* and interest.

The defendant Rothery said, that although the partners were to procure collateral securities according to their shares, yet it was to be merely collateral to the deposit of the deeds, and that the estates were to be charged with the 12,000*l.* He stated that the Hope Company had retained his dividends on the shares he had therein as a security for the 12,000*l.*, in case it should be held that the plaintiff was not bound to pay it.

The other partners admitted in their answers that they were

to procure collateral securities, but they all, except G. Bridges, denied it was on their own behalf. G. Bridges admitted that he and George Elmer were to find sureties on their own behalf.

Rothery contended, that the plaintiff was still indebted to him in a considerable sum of money.

Mr. *Rose*.—The plaintiff is a gentleman of considerable landed property, and a merchant, and the defendants are the Hope Insurance Company and others. The object is to obtain as against the insurance company, the deeds, not disputing to pay them their principal and interest, but denying the right of the sureties to any claim upon the deeds. The plaintiff was entitled to seven twenty-fourths of this joint adventure. Up to 1814 this speculation was fortunate. *In 1814 the plaintiff went to [*157] the Cape on an adventure to the joint account. The bonds were entered into by or on behalf of the partners for their own respective proportions: Rothery had no right to raise money upon the plaintiff's deeds. The 12,000*l.* was not to be thrown upon the plaintiff, but only a fractional part of it equal to his interest. The ship *Melantho* was sent home to this country to be sold. (Mr. *Rose* then read several letters from Rothery to the plaintiff, dated Doctors' Commons, one on the 16th November, 1815, suggesting a new mode of remitting; another letter in January, 1816, that a dissolution of partnership had taken place between Bridges and Elmer, and expressing his astonishment at it. Another letter in February, 1816, that Bridges and Elmer could not provide their proportion of the acceptances coming due, and expressing that it was fortunate that he did not meet with a ready sale at the Cape, as he would then have remitted the produce to Bridges and Elmer, expressing his opinion that they were not rich. Another letter, 20th March, 1816, repeating the good fortune of no ready sale; and another letter, 7th December, 1816.) These letters present perfect satisfaction with the plaintiff, and that his property was not to be resorted to.

The power of attorney was dated in May, 1816, and does not notice the relation of the plaintiff with the partners, and the

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plaintiff thereby appoints his wife, Burleigh and Rothery, his attorneys, to defend actions, to sell the ship *Melantho*, to effect insurances, &c. It is given by the plaintiff in his individual character; it does not give authority even to borrow money, but only to do the special acts mentioned. The Hope Insurance Company must put their case upon this power of attorney, and that power cannot support it. It is true, there are general [*158] words to act generally. In the case of *Atwood* *and *Munnings(a)* in the King's Bench, the general power was held only to enable the attorneys to carry the special powers into execution; and that a bill drawn by the attorneys for partnership purposes was not within the power. If Rothery had not combined the character of chairman of the Hope Insurance Company and plaintiff's agent, no money would have been advanced by that company: if therefore, he, under the power of attorney borrowed money for partnership purposes, he could not legally do it. Did Rothery make use of the plaintiff's deeds for the purposes of the plaintiff, or for his own purposes? The transaction could not bind the plaintiff, nor affect his title deeds. The inference to be drawn from the deeds executed by Mrs. Munnings and T. Burleigh is, that the company's legal advisers well knew it; or why, if the attorneys had sufficient authority, was a covenant introduced, that the plaintiff should execute a mortgage in eighteen months? Rothery is a general trustee for the company, and as such the covenant was made with him; and as such, and not as one of the attorneys, he was a party. There can be no case as against the plaintiff in such a transaction. It is a distinct case from Rothery borrowing money as a partner. No letter reached the plaintiff after the letter of December, 1816. He did not arrive in this country until December, 1821, when he was ignorant of what had been done, but he soon found an immediate necessity for raising 6,000*l.*, and he wrote the letter to the insurance office, bearing date the 8th of November, 1821,(b) and another letter on the 20th of November, 1821;(c) also, another letter of 27th of November, 1821, declining to execute the mortgage. Now, upon the whole of these

(a) 7 B. & C. 278.

(c) *Ante*, p. 155.(b) *Ante*, p. 154.

letters from the plaintiff to the Hope Insurance Company, it is plain that he was acting under the impression that his property had been properly dealt with. His *attention [*159] had not been deliberately directed to the facts, and, therefore, the letters could not be held to be a confirmation. It was to be considered only as a proposal to execute the mortgage, if 6,000*l.* more were advanced. It was not accepted by the company, and effected nothing.

The Hope Company brought an action of *assumpsit* against him; by some slip he had not been able to plead in abatement, and he was put under terms not to take advantage of his partners not being parties, and a verdict passed against him. He then executed a mortgage to the Hope Insurance Company, mentioned in the supplemental bill.

Mr. *Lynch*.—The condition of each bond was, that if the plaintiff failed to execute the mortgage the obligors were to pay these sums. The power of attorney is not recited in the bonds; but the bonds notice the articles of agreement. The sureties, by their answer, state that the bonds were entered into at the solicitation of the respective partners for whom they were sureties.

These sureties were for 7,000*l.*, and the 5,000*l.* makes the 12,000*l.*

I mean to say, first, that they were not sureties for the plaintiff; secondly, that there was no valid deposit; and, thirdly, that there was no confirmation.

A person entering into a bond does not become a surety without the request of the principal. These sureties could not have been for the plaintiff, he being abroad.

The assurance on Mrs. Munning's parting with the deeds, was, that each of the partners should get his own securities in respect of his share. There is no evidence *that they [*160] were the plaintiff's sureties. The case of *Atwood* and

Munnings in the King's Bench has decided that a general power did not give the authority. Again, the deposit cannot be extended beyond the Hope Company; that has been decided in *Ex parte Whilbread*: (a) it surely will not be contended that the loose language of the letters gives such an authority. Next, as to confirmation, if the parties had no power to deposit the deeds the transaction is good for nothing. Rothery obtained this money, not for the use of the plaintiff, but for partnership purposes; a partner has not a right so to deal with his co-partner's property. The letters of the plaintiff are mere conditional proposals, which not having been accepted, cannot be read against him, according to the decision of judges both at law and in equity. These letters do not refer to the sureties; and, at all events, they cannot be carried further than as securing the company. And there is no evidence to show that the plaintiff was aware of the circumstances when he wrote the letters.

THE MASTER OF THE ROLLS:—On the 7th of November, 1817, Mrs. Munnings and Mr. Burleigh, her son-in-law, on the company advancing 12,000*l.*, covenant that the company shall retain the deeds as security, and Burleigh covenants that the plaintiff shall execute a bond or mortgage for securing that sum. It is impossible to contend that they had authority to enter into that engagement; but did Mr. Munnings confirm it? Mr. Munnings at that period was abroad, and he continued abroad until October, 1821, when he returned. On the 8th of November he writes a letter to the Hope Insurance Company. I [*161] *cannot conceive any language more clear and express than his admission of the engagement entered into by his wife and son-in-law. His letter is in these words: "Being desirous to raise a sum of money to discharge some engagements entered into by myself and others, which remain to be paid, I propose to borrow a sum of 6,000*l.*, to be secured on my Essex property, which you now *hold*." He then proceeds, "in addition to the sum of 12,000*l.* already advanced by your honorable company and secured thereon, which security I trust you will consider to be satisfactory." Now, it is asserted at the bar that this

(a) 1 Rose, 293.

is not admission, but merely proposal, "which you will consider to be satisfactory." Does not this show that he had no idea of disturbing the security. He then adds, "you have already received in aid of the said security between 5,000*l.* and 6,000*l.* Having been abroad during the last six years in the East Indies, the mortgage deed for securing the above sum of 12,000*l.*, which I understand was sent to me, never reached me. That deed I am ready to execute, and do any act that may be considered necessary and satisfactory to you for securing the repayment of such further sum as may be agreed to be advanced." This, too, it is contended, is a conditional proposal. A greater perversion of the effect of language could scarcely have been made. Now, without referring at all to the other letters, this is a clear acknowledgment of the title of the Hope Insurance Company.

But it is said that he was in ignorance of the facts; is it possible to believe this gentlemen had not been informed by his wife and son-in-law of all they had done on his part? It must be intended upon every principle of evidence that when he wrote this letter he was in full possession of all the facts.

*The next question is, whether the sureties, and who [*162] in particular of them, have a right to stand in the place of the mortgagees. One of these sureties was a partner, and he must admit to a partnership account.

The other persons who entered into these securities were not partners, and it is said they have no claim on the estate, as their security was given on account of others of the partners, at whose request they entered into the engagements. If it had been stipulated when they became sureties that they should not claim against the plaintiff's estate, it would have been a different matter. On what principle, then, is it that they are not entitled to the full benefit of the security arising from Mr. Munning's estate? The question is, have the sureties a lien on the estate? If a surety pay part of a sum for which an engagement has been entered into by the principal, he may claim against the estate that formed the principal security.

It is impossible without stipulation to exclude the sureties from being entitled to the security of the estate pledged. I am of opinion that they have a lien upon the estate pledged for the sums paid by them.

Refer the partnership accounts to the same master before whom the partnership accounts were taken in another cause.

I must declare that the several sureties not being partners have a lien upon this estate for the amounts they have paid, with interest and costs.

The decree has not yet been passed and entered, but the following is the substance of the minutes as they at present (March 1830) stand:—

[*163] *Decree, that, subject to the mortgage to the Hope Insurance Company, the defendants, J. Adamson, Richard Jackson, John Lewis, John Elmer, Robert Howlett and John Burleigh, and Elizabeth Stott, as the representative of Thomas Stott, deceased, sureties for the plaintiff to the Hope Assurance, and not being partners with the plaintiff, are entitled to a lien on the estate for the principal money paid by them in respect of the sum of 12,000*l.*, together with interest at five per cent, and their costs and charges. Refer it to the master to take account of what is due to the Hope Insurance Company for principal and interest on the mortgage in the pleadings named, and to tax their costs.

Also to take an account of what is due to the sureties for principal and interest, charges and expenses, and to tax their costs.

Decree, that upon plaintiff paying what is due to the insurance company and sureties within six months after the master shall have made his report, then that the trustees of the Hope Insurance Company reconvey the mortgaged premises to the plaintiff, and that the sureties join therein. In default of the plaintiff redeeming the insurance company, the sureties are to be at liberty to redeem the company, and then it is referred to the master to tax subsequent interest and costs, and appoint a new time and place for payment; and upon the sureties paying to the trustees of the insurance company their principal, interest and costs, within three months after the master shall have made his report, at such time and place as the master shall appoint, the trustees are to reconvey to the sureties; and, in default of payment both by the plaintiff and the sureties, the bill to be dismissed, as against the trustees of the company and the sureties, with costs. The master to take an account of all partnership dealings and transactions between the plaintiffs, and the defendants, William Rothery, George Bridges, George Elmer, Samuel Howlett and Thomas Burleigh. The master to be at liberty to state special circumstances.

Further directions and costs reserved.

1829.—Barton v. Croxall.

*BARTON AND OTHERS v. CROXALL AND OTHERS. [*164]

Partition.—Assignment of Term of Years to attend.—No Revocation of Will.—Costs.—Heir at Law.

WESTMINSTER HALL.—1829: 3d July.

A testator devised his moiety of an estate, and then made partition with his co-tenant; on this, the estate was conveyed to a trustee as to one part, to the use of the testator in fee; and a mortgage term created by the co-tenant in his moiety was assigned to attend the inheritance.

Held, that this is not a revocation of the will.

Costs refused to the heir at law, he having conveyed his interest to two of his sisters.

JOHN BARTON, by his will, bearing date the 8th of September, 1775, gave unto Edward Croxall, Esquire, the sum of 500*l.*, to be raised and paid out of moneys to arise from the sale after mentioned of his copyhold and real estates, upon the trusts therein mentioned; and he gave and devised unto his wife and Edward Croxall, their heirs and assigns, with other hereditaments, his undivided moiety or half part of and in a messuage, and certain lands, upon trust, that his wife and Edward Croxall, or the survivor of them, or the heirs of such survivor, should, when and as soon as they should think fit, sell and dispose of the same: and the money arising by and from such sale, after payment of the 500*l.*, he willed and desired to be placed at interest, until the same should be paid to his children, at the time and in manner thereinafter mentioned; which interest, and the rents and profits in the meantime, were to be applied to the maintenance of the children, with the usual directions for the trustees to convey to the purchaser.

There were at this time seven children, but by a codicil the testator directed that John Barton, his eldest son, should have no share of the moneys to arise by the sale; and that the part intended for him should be divided amongst his other children, except his daughter Jane; and the testator also directed that a sum of 100*l.* which he had given to her, should be considered as part of her share under the will.

- [*165] *The testator, after making his will, agreed with Carter Barton, the person entitled to the other undivided moiety, or half part of the messuage and lands for the division thereof; and accordingly the testator and Carter Barton entered into mutual bonds, bearing date respectively the 16th April, 1788, whereby they severally became bound to abide by the award of Edward Palmer and Thomas Hanson, who were to make a fair partition of the premises; and to settle all other matters between the parties, relating to the same premises. The arbitrators accordingly proceeded in making a partition of the estate between the testator and Carter Barton; and by indentures of lease and release, bearing date respectively the 15th and 16th days of June, 1791; the release between Carter Barton, of the first part; the testator, John Barton, of the second part; Joseph Scott, a mortgagee for years of Carter Barton's undivided share of the third part; John Dale, of the fourth part; and Charles Palmer, of the fifth part. After reciting amongst other things the award of the arbitrators, Carter Barton and the testator conveyed unto John Dale the messuage, buildings and premises, to the several uses following: (that is to say:) as to the south side of the said messuage, buildings, lands and premises therein particularly described, to the use of Carter Barton, his heirs and assigns forever; and as to the north side thereof, therein also particularly described, to the use of the testator, his heirs and assigns forever, free from all incumbrances except a mortgage term of 1,000 years created of Carter Barton's moiety of the said premises, and then vested in the said Joseph Scott; and the said Joseph Scott, in consideration of the principal and interest to him paid by Carter Barton, assigned the undivided moiety of the premises so in mortgage to him, to Charles Palmer, his executors, administrators and assigns, for the residue of the said term of 1,000 years therein
- [*166] *then to come and unexpired, in trust, as concerning the north side or part of the entirety of the premises for the testator, John Barton, his heirs and assigns, and to attend and wait upon the freehold and inheritance of the said north side or moiety of the premises; and as to and concerning the south side thereof, in trust for Carter Barton, his heirs and assigns, and to

attend and wait on the freehold or inheritance of the south side or moiety of the premises.

The testator died on the 31st March, 1792, some time after the execution of the said deeds of partition, and without having altered, expressly revoked, or republished his will, and leaving Jane Barton, his widow, John Barton, his eldest son and heir at law, and six other children; these six younger children then became entitled to the moneys which should be produced by the sale.

The bill, after setting forth the preceding facts, then states, that notwithstanding the great length of time which had elapsed since the death of the testator, Edward Croxall, the surviving trustee under the will of John Barton, had not proceeded to a sale of the premises devised to him for that purpose, by the will of the testator. And the bill charged, that he refused to do so without the direction of the court. And the bill prayed, that Edward Croxall might be decreed to proceed to a sale, that all necessary parties might join therein, and that the moneys to arise therefrom might be divided amongst the plaintiffs and other persons entitled thereto.

Edward Croxall having died, the bill was revived against his son *of the same name*, who, in his answer admitted that his father never did proceed to a sale, *because that [*167] for many years after the death of the testator, the parties interested in such sale did not require such sale to be made, or did not agree about the sale thereof; and that some of the parties were unwilling it should take place, and submitted to act as the court should direct. This defendant then also died, and the bill was revived against his devisees, William Tongue and Thomas Holbecke.

The heir at law, by his answer, submitted it was a question of law, whether the said alleged deeds of partition, of the 15th and 16th of June, 1791, did or not, in any and what manner, operate as a revocation of the testator, John Barton's will, in the whole

1829.—*Barton v. Coxall*.

or in any, and what part thereof, and how. Also whether he was or was not entitled to the moiety of the lands, hereditaments and premises as the heir at law of the testator, John Barton, or to such portion or part of the entirety, as the testator acquired under the alleged deeds of the 15th and 16th June, 1791, if such were made, or any other deeds, and if such deeds of the 15th and 16th June, 1791, or any other deeds operated as a revocation of the testator's will and codicil, which the defendant submitted to the judgment of the court.

Mr. *Pepys* and Mr. *Whitmarsh* for the plaintiffs.

Mr. *Roupell*, jun., for one of the children.

Mr. *Beames* for the heir at law:—The partition was a revocation of the will, because the testator, or more properly his trustee, took under the conveyance an estate different from that he previously possessed. The two owners conveyed to a trustee, and a term was assigned to attend the inheritance. It is not meant to contend that a simple partition revokes a devise, (a) *but to avoid a revocation he must take back the same estate. In the case of *Tickner v. Tickner*, cited in *Parsons v. Freeman*, (b) the father died seised in fee of an estate in gavelkind intestate, and left two sons, who entered on his death, and became seised in gavelkind. One of them made his will, and thereby devised his undivided moiety to his wife and her heirs, subsequently by a deed of partition between the brothers, and by a fine, all this gavelkind estate was allotted entirely to him, who had so made his will to such uses as he should appoint by deed or writing. And in default of such appointment to him in fee, this was held by Lord Chief Justice Lee, to be a revocation of the will.

There was also the case of *Goodtile and Otway*, (c) in which

(a) *Luther v. Kidby*, 8 Vin. tit. Devise; 3 P. W. 170; 2 Ves. jun. 600; *Swift v. Roberts*, Burr. 1490.

(b) 3 Atk. 742; Ambler, 116.

(c) 1 B. & P. 576; 2 H. Bl. 616; 7 T. R. 399; *Sparrow v. Hardcastle*, 3 Atk. 803; 4 Burrow, 1969; 1 Roll. Abr. 615.

the question was, whether a devise was rendered ineffectual by a subsequent lease and release to trustees upon certain trusts, with remainder to the testator in fee. Mr. Justice Rooke, said, if a testator having executed his will, conveys away his whole fee simple, though it be to his own use, yet, according to the rules of law, that conveyance renders the will ineffectual, for he has altered his legal seisin. He added, partition is an exception, for parceners and tenants in common being seised only of their respective portions in an undivided whole, would, by writ of partition, retain their seisin in the portions allotted them, and they may divide by deed and fine;(a) but he adds, the courts of law are rigid in this, and cites the example in *Tickner v. Tickner* as a revocation.

*Mr. Justice Buller considered the point of revocation [*169] so fully established by ancient and modern authorities, that to doubt about it would be to shake the rules of property; referring to *Tickner v. Tickner*,(b) he said the fee and the old use vested in the testator, and yet because the partition was made by means of a conveyance to a trustee, it was holden to be a revocation. He found it difficult to reconcile the case of *Tickner v. Tickner* with *Luther and Kidby*, if in partition the estate be conveyed to a trustee, though for an instant only, and though the old use remain, he thought that cases established it to be a revocation.

In a subsequent case,(c) Lord Eldon said, "that the deviser must continue to have the land to his death, when the devise is to take effect; if a partition is effected either by compulsion or agreement, and the thing done is nothing more than partition, it is not a revocation; the slightest addition to that purpose will make it, not as a partition, but on account of that slight addition, a revocation, and if the parties will even introduce a power of appointment prior to the limitation of the uses, that very slight

(a) *Risley v. Baltinglass*, Sir T. Raym. Rep. 240.

(b) Ambl. 117.

(c) *Bridges v. Duke of Chandos*, 2 Ven. 429; *Knollys v. Alcock*, 1 Ven. 564.

circumstance is sufficient." In another case,^(a) Lord Eldon said, the case of partition is always considered a sort of special case, each party can compel the other to make partition. There is one other case before Lord Eldon, that of *Maundrell v. Maundrell*,^(b) where his Lordship said that the distinction between *Tickner v. Tickner* and *Luther v. Kidby* was *obvious: in the one, the object was a mere partition; the deviser, having an undivided moiety of an estate, took a divided moiety, and it was held no revocation, there being no purpose beyond partition; but where a partition is made, and in the mode of doing it the deviser conveys to such uses as he shall appoint, and in default of appointment to himself in fee, that is a revocation. Why? Because he had limited the power. This principle was acted upon in *Rawlins v. Burgess*.^(c) A person who had contracted for the purchase of an estate made his will, and afterwards took a conveyance to the common uses to prevent dower: the Vice-Chancellor considered the question to be, whether the estate remained the same without modification. The contract pointed only at an estate in fee. The conclusion must be, that there were some object beyond the mere completion of the contract, by taking the legal estate; and consistently with all the authorities, the effect is a revocation. The same point was decided in *Ward v. Moore*.^(d) The subsequent conveyance made an alteration in the quality of the estate, and was, therefore, a revocation. From all these authorities it follows that the partition and the mode of effecting it, were in the particular case now before the court a revocation of the will.

Mr. *Bickersteth* and Mr. *Lynch*, for several of the children, opposed the sale, contending they had a right to elect to take the fee.

THE MASTER OF THE ROLLS :—The testator has directed a sale.

(a) *Attorney-General v. Vigor and others*, 8 Ves. 281; *Ward v. Moore*, 4 Madd. 368; *Rawlins v. Burgess*, 2 V. & B. 382.

(b) 10 Ves. 249.

(c) 2 Ves. & Bea. 382.

(d) 4 Mad. 372.

It is true they might have elected to take real estate, but what pretence is *there to say they have elected? [*171] There is nothing to show that the parties intended to give up the advantage of the sale; therefore the only point I wish to call attention to, is that of the partition.

Mr. *Pepys* contended, that that which is necessary to the partition is not a revocation, but what is inconsistent with it, is; and that in this case the assignment of the term was not inconsistent with partition, and that nothing had been done that would have the effect of revoking the will.

Mr. *Bickersteth* then commented upon the case of *Tickner v. Tickner*, cited by Mr. *Beames*, and contended that not any case had been cited where the party took the same interest, in which it had been held that a partition was a revocation.

Cur. adv. vult.

1830: *February 8th*.—THE MASTER OF THE ROLLS:—It is admitted that a mere partition, without more, does not revoke a will. Here the nature of the interest was not changed, nor was there a new power of disposition acquired, and a mere assignment of a mortgage term to attend the inheritance does not revoke the will.

Decree a sale, and that all proper parties join therein, and in the conveyance, including the heir at law, and that the purchase money be distributed according to the rights of the parties as prayed.

Costs were refused to the heir at law, and to those who claimed under him. It appeared that the heir at law had conveyed to two of his sisters.

*The representative of Edward Croxall, the trustee, to [*172] have his costs as between attorney and client; and all other parties who do not claim adverse to the will, to have their costs.

1829.—*France v. Woods.*

FRANCE v. WOODS.

Notice to Agent.—Liability of Executors.

ROLLS.—1829: 22d July.

Trustees not affected by notice to their agents, which he did not receive in that character.

Trustees, having contracted to purchase land, sell out stock and deposit the produce at a banker's, when the purchase seems to be near completion. They are not liable to make good the money if the bankers fail.

THE bill, in this cause, was filed for the purpose of administering the assets of John France, by the person entitled for life to the income of the real and personal estate. The defendants were his executors, Thomas Woods and Wm. Berry, and several persons interested under his will. The bill also sought to make the executors personally liable for certain sums, parts of the assets, which had been lost by the failure of Messrs. Warwick & Company, bankers.

By the decree made by the Vice-Chancellor on the 26th February, 1827, it was referred to the master to take the usual accounts of the testator's personal estate, debts, funeral expenses and legacies; "and in taking the account of the testator's personal estate, it was ordered that the master should ascertain and state to the court what balances or sums of money, part of the testator's personal estate, or the interest or dividends arising therefrom, were in the bank of Messrs. Warwick & Co. at the time of their becoming bankrupts, and under what circumstances such balances or sums of money were paid by the defendants into the said bank, and whether the same ought to have been paid into or allowed by the said defendants to have remained in such bank, *particularly in reference to the respective times when the said moneys were so paid into the said bank."

By the master's report, dated the 12th October, 1828, he stated the testator's will, by which he directed payment of several sums

of money; and that his executors should not be answerable for the loss of the trust moneys, "in depositing the same in any banker's hands or elsewhere for safe custody."(1) And that the

(1) An administrator cannot be made responsible for the loss of property of his intestate, occasioned by his not bringing suit until the act of limitations opposed a bar to recovery, unless he acted with bad faith, was guilty of fraud, wilful default or gross negligence. *Thomas v. White*, 3 Lit. 177. Executor's estate made liable for the value of the estate of testator, sold by him without authority; and also made liable for the securities which might prove defective. *Smith v. Executors of Smith*, 1 Desau. 304. An executor is not liable for the acts or omissions of the master, in not taking securities, or collecting the funds, where the master has been ordered to sell the estate, collect the money and pay it over to the executor. *Thomson v. Wagner*, 3 Desau. 94. Executor made liable for gross neglect, in not recovering a debt, where the party became insolvent. *Witherspoon v. M'Calla*, 3 Desau. 245. An administrator, paying debts out of the original order or proportion, is liable to creditors, and he is not allowed to retain, for debts due to himself, more than his proportion. *Lenoir v. Winn*, 4 Desau. 65. If an executor or administrator omits to plead, and allows judgment to be taken against him by default, this is not such an unqualified admission of assets as to make him irrevocably chargeable. This court will give him an opportunity of showing the fact. *Ib.* An executor, selling on a credit the personal estate of the deceased, and not taking personal security from the purchaser, as prescribed by the order of the court of ordinary, is liable for the debt in case of the insolvency of the purchaser; but such insolvency must be established before the executor's estate is made absolutely liable. *Stukes v. Collins*, 4 Desau. 207. An executor or trustee cannot purchase the trust property from his co-executor or trustee, without being liable for the profits arising from the property purchased. *Case v. Abel*, 1 Paige, 393. It is the duty of executors and trustees to keep the trust funds separate and distinct from the private funds. If they use the trust funds, or mix them with their private funds, they will be made liable for all losses which may arise from their neglect or mismanagement. *Ib.* An executor, having given his own note for a debt due by the estate, does not exempt the estate from the liability; and he may be sued in equity as executor for it. *Douglas v. Fraser*, 2 McCord's Ch. Rep. 111. If the administrator, on the sale of his intestate's property, take any other security than that required by the terms of the order for sale, he becomes personally responsible; and if a loss ensue, it must fall upon him. *Peay v. Fleming et al.*, 2 Hill, 98. An executor or administrator, having sold a slave, the same not being necessary for the payment of debts, must account for the hire to the time of rendering the decree, and his value at that time, in a suit by distributees. *Hennings v. Conner*, 2 Bibb, 188. Chancery will not make an executor, who has disbursed all the assets, liable on a parol promise, to set off a demand accruing to him as executor, against a debt due from the testator. *Crews v. Williams*, 2 Bibb, 262. If A. devise lands to B., chargeable with the payment of a legacy to C., if his personal estate should prove insufficient, and appoint D. his executor, in a suit by C. against the executor of D. he must charge in his bill, and show that the personal estate of A. was sufficient to pay debts and legacies. It is not sufficient to

1829.—*France v. Woods.*

testator, for a very long time before his death, kept his banking account with Messrs. Warwick & Co., and had always a considerable balance of cash in their hands, amounting at the time of

charge that the personal and real estate were sufficient. *West's Executor v. Hall*, 3 Har. & Johns. 221. If an administrator sells leasehold property, and takes the notes of the purchaser, without other security, the administrator is liable to the next of kin for the amount not paid by the purchaser who has become insolvent. *King v. King*, 3 Johns. Ch. Rep. 552. Land may be sold under an execution against an executor or administrator, though there may be personal assets. *Smith v. Executors of Smith*, 1 McCord's Ch. Rep. 134, 148. The estate of a deceased executor, who obtained judgments for debts due to his testator's estate, and afterwards gave credit to the debtors, who were perfectly solvent during his lifetime, but became insolvent after his death, was not held liable to the legatee for the loss so incurred. *Doud v. Sanders*, Harp. Eq. 277. An executor named in a will, and who never qualified as such, but who took possession of some part of the personal property of the testator, was held, by these acts, to have elected to act as an executor, and was chargeable as executor. *Van Horne v. Fonda*, 5 Johns. Ch. Rep. 403. Administrator in the third degree cannot be called to an account for the estate of the first intestate, without proof that it, in fact, came to his hands. *Barbour v. Robertson*, 1 Litt 96. If an executor suffers the family of his testator to take possession of the property, and to convert any part improperly to their own use, he is liable for it, they being regarded as his agents. *Wright v. Wright*, 2 McCord's Ch. Rep. 199. One of the executors, who remained in the state, gave to the other, who was about removing out of it, and who did afterward remove, an acknowledgment of having received all the moneys, evidences of debt, property of every kind, &c., of the estate; held to be conclusive evidence to charge the executor who remained with the whole estate. *Edmonds v. Crenshaw*, Harp. Eq. 224; *S. C.*, 1 McCord's Ch. Rep. 252. An executor is not to be charged with the debts due to the estate of his testator, at the time when they became due, but only at the time when he actually received them; except such debts as are lost by his negligence or improper conduct. *Cavendish v. Fleming*, 3 Munf. 198. The only remedy, at present, against an administrator or his representatives, for any waste or misapplication of the effects of the deceased, is by an action at law upon his administration bond, by any person interested. *Hagthorp v. Hook's Administrator*, 1 Gill & Johns. 270. If, owing to the conduct of the administrator, any uncertainty exist as to the amount of the profits made by him on the purchase, he will be chargeable with the largest amount which, from the circumstances, he can be presumed to have realized. It is a rule, both at law and in equity, that if a person having charge of the property of another so confound it with his own that it cannot be distinguished, he must bear all the inconvenience of the confusion; and, if it be a case of damages, the damages given against him will be the utmost value of the property. *Brackenridge v. Holland*, 2 Blackf. 377. One who is both administrator and guardian will be deemed to hold the assets in the former capacity, where no change in the manner of holding appears, and his sureties as administrator will alone be chargeable. *Johnson v. Fuquay*, 1 Dana, 514. The purchaser from a distributee, of his interest in a decedent's estate, may

his death to 5,696*l.* 10*s.* 2*d.*, and that they allowed him 4 per cent. interest on his balance; and that Thomas Crook, who was a principal clerk in the banking-house of Messrs. Warwick & Co. for some years previous to, and at the death of the testator, was, as such principal clerk, frequently consulted and employed by him as his confidential agent in the management of his pecuniary concerns; and that after the death of the testator, the defendants, Thos. Woods and Wm. Berry, with the concurrence and approbation of the plaintiff, applied to and requested the said Thos. Crook to assist them in and about the testator's property, and the management of the executorship and of the trusts; and that the defendants resided a considerable distance from each other, and from the neighborhood of the testator's real estate, and were wholly incompetent and unable to manage the affairs of the trust without assistance; and that they accordingly, with the approbation of the plaintiff, employed Thos. Crook to assist them in maintaining a bill in his own name, for the share he purchases, making his vendor and the other distributees, as well as the administrator, parties. *Kavanaugh v. Thacker*, 2 Dana, 136. In a suit at law, upon an executor's or administrator's bond, for a refusal to make distribution, it may be necessary for the complainant to aver and prove that, before the suit, he tendered a bond to refund, in case debts should appear. In Chancery the rule is not so strict. There the whole controversy may be settled, though no bond has been tendered; and the complainant, first being required to give the bond, may have the appropriate relief. *Ib.* Executors *de son tort* are only chargeable with assets which come to their hands; they have no right, as lawful executors have, to reduce the other assets, and therefore, are not liable for not reducing and administering them. *Kinard v. Young*, 2 Richardson's Eq. Rep. 247. Where an executor *de son tort* who has not called on creditors to render their demands, is compelled to apply the assets received by him to debts of an inferior grade, he may be afterwards compelled to apply the value of the same assets to debts of a higher grade, and of which he had no notice. *Ib.* An executor *de son tort* is liable for interest, from the death of the testator, if, at that time, he took possession of the assets. *Ib.* An executor *de son tort* has no right to retain for his own debt, but with this exception, he may pay debts, even one to which he is surety, in the same order in which a rightful executor is required to pay them. *Ib.* If an executor or administrator brings a suit in Chancery, which, from papers in his possession, he had good reason to believe was unfounded, or where, by ordinary care and diligence in ascertaining the facts, he would have ascertained the suit to be unfounded, the court, in its discretion, may charge him with costs personally, if the estate in his hands is insufficient to pay such costs. *Roosevelt v. Ellithorp*, 10 Paige, 415. A suit is wantonly brought by an executor or administrator where it is brought by him without probable cause, or where he has not exercised ordinary care and diligence to ascertain whether there was any just cause of action. *Ib.*

rious matters respecting the executorship and trust; and that the defendants, in the presence of the plaintiff, agreed to employ Messrs. Warwick & Co. as their bankers, in respect of [*174] the trust moneys belonging to the *testator's estate; and that Messrs. Warwick & Co. were induced, in consideration of the large balance which the testator had left in their hands, to allow upon all the trust moneys deposited with them the same rate of interest which they had allowed to the testator during his life, although interest at 3 per cent. was usually allowed by them upon temporary deposits; and that the defendants employed Messrs. Warwick & Co. as their bankers, in respect of the trust moneys, until they stopped payment and became bankrupts; and that there were then in their bank the balances mentioned in the report, part of the testator's personal estate, or interest or dividends arisen therefrom.

And he found that the defendants, in execution of their trust, had entered into a contract for the purchase of real estate; and when they had every reason to believe that the purchase would be completed without delay, in order to provide for the payment of the balance of the purchase money, and also to raise certain other sums of money which were then wanted for the trust estate, and for which the defendants had not sufficient funds in their bankers' hands, they, in the month of August, 1821, sold out 3,000*l.* navy 5 per cents., and caused the produce to be placed in the bank of Warwick & Co., and the defendants on that occasion stated to Thos. Crook, that they firmly believed that the money would be called for in a very short period of time. And he stated the circumstances which had delayed the conclusion of the purchase; and that, consequently, the defendants were prevented making the payment of the balance of the purchase money, amounting to 3,200*l.*, out of the funds which were in the hands of the bank of Messrs. Warwick & Co. previous to their bankruptcy. And the master allowed the executors these balances.

[*175] *The plaintiff excepted to the master's report. The first exception being, that the master ought to have stated that he found by the depositions that Thomas Crook was, from the 1st of January, 1810, to the time of the said Messrs. War-

wick and Co., becoming bankrupts, their first and confidential clerk, and acquainted with the state of their affairs, and knew that the said Messrs. Warwick and Co., long before the time of their becoming bankrupts, were unable to pay the debts due from them, and must have stopped payment if called upon to pay the whole or a considerable part of the debts due from them, being the substance of the evidence of the said Thomas Crook; or, that the said master ought to have set forth the evidence of the said Thomas Crook at length.

The second exception was, that there did not exist any reason to believe that the purchase would be completed without delay.

And the third exception was, that this sum of 3,200*l.*, ought not to have been paid into such bank, or, if so, ought not to have been allowed by the defendants to remain in such bank.

Mr. *Pepys* and Mr. *Lynch* for the exceptions, contended that Crook, the agent of the executors, knew the insolvent state of the bank. A notice to the agent is notice to the principal. The moneys ought not to have been continued in the bank.

Mr. *Bickersteth* and Mr. *Mathews* on the other side.

July 25th.—THE MASTER OF THE ROLLS:—Nothing would be more injurious to the interests of society, than the allowance of these exceptions. *Mr. Crook was employed by the testator, and the trustees only continued him. Can these trustees be liable to the losses occasioned by the failure of these bankrupts? Notice to the agent, is notice to the principal, but then it must be in the character of agent. It cannot be held that they were liable. Secondly, it is said that the stock was sold out before it was wanted. Now it appears by the contract, that the purchase money was to be paid on the 22d March. [His Honor here referred to some letters to the vendor's solicitors. The trustees having received satisfactory answers to most of the inquiries, and in order that no time might be lost in completing the conveyance, sold out stock in August; from cir-

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cumstances, the conveyance was not completed until February, and before that time arrived the bankers had failed. I am of opinion that it would be extremely injurious to the interests of society, that it would prevent persons from becoming trustees, were I to allow these exceptions. I shall, therefore, overrule them.

There were three other exceptions by the executors, in respect of sums which the master had disallowed. The two latter were allowed, on the principle on which the plaintiff's exceptions were overruled: but the first of the executors' exceptions was disallowed, as not coming within it.

Reg. Lib. A. 1828, fol. 2652.

[*177] *BETWEEN JOHN COOPER AND JOSEPH SPRATT, *Plaintiffs*; AND FERMIN DE TASTET AND LOUIS CABANON, *Defendants*.

Interpleader.—Private Warehouse.—Bonded Warehouse.

WESTMINSTER HALL.—1829: 13th November.

Warehousemen being private agents, and not holding goods as the possessors of a public bonded warehouse, cannot maintain a bill of interpleader.

But where goods are deposited in a public bonded warehouse, a bill of interpleader may be maintained against contending claimants.

THE plaintiffs were warehouse keepers in Mark Lane. In April, 1819, Messrs. Bize, Bordenave & Co. instructed them to land from the ship *Sirene* sixty-one bags of French wool, and warehouse them, which was accordingly done, and the wool was entered in the plaintiffs' books in the names of Bize, Bordenave & Co. On the 14th of April, the plaintiffs delivered to the order of Messrs. Bize, Bordenave & Co. six of the bags. On the 3d of July, Messrs. Bize, Bordenave & Co., sent to the plaintiffs an order to transfer the remainder of the wool, [reserving to themselves the privilege of drawing samples,] to the defendant De Tastet, and it was accordingly transferred into his name.

On the 6th of July, Messrs. Bize, Bordenave & Co., sent to the plaintiffs an order for the delivery of certain samples of the wool, which was complied with.

The plaintiffs, on the 28th of August, received from Augustus Roehn, a letter demanding the fifty-five bags of wool, offering to pay the warehouse charges, and to indemnify the plaintiffs for the delivery thereof, and stating that the defendant De Tastet had no claim whatever *thereon. This was ac- [*178] companied by another letter from Messrs. Bize, Bordenave & Co., confirming the statement in Roehn's letter, and requesting the plaintiffs to deliver the wools to Roehn or to warehouse them in his name, and that they would indemnify the plaintiffs for so doing. The letter was written by Roehn as the agent of the defendant Louis Cabanon. On the other hand, the defendant De Tastet claimed the wool as his property. On the 20th of October the defendant Cabanon sent the plaintiffs a letter demanding the wool as his property, threatening an action if the same were not delivered to him, and giving notice that he had sold the wool, and offering to show the most clear evidence of his right.

The bill stated the preceding facts, and prayed that the defendants might interplead.

After the bill was filed, the plaintiffs, with the consent of De Tastet, delivered to the defendant Cabanon twenty-eight of the bags of wool.

The defendant De Tastet stated in his answer that he and Bordenave carried on the business of insurance and commission brokers, and in some few instances they carried on business as merchants under the firm of Bize, Bordenave & Co., that in the month of April, 1819, Cabanon or Roehn consigned sixty-one bags of wool to Bize, Bordenave & Co., in which firm he, the defendant, was a partner. The defendant also stated in his answer, that the firm of Bize, Bordenave & Co., made advances for Cabanon to the amount of 674*l.* 13*s.* 3*d.* on the credit of the pro-

ceeds to arise from the sale of the wool, and that the transfer was made to him in part satisfaction of a large sum of money lent by him to the firm.

*Mr. *O. Anderdon* for the plaintiffs.

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Mr. *Kœ* for the defendant *De Tastet*.

The other defendant did not appear.

THE MASTER OF THE ROLLS:—The plaintiff received these goods as the private agent of Messrs. Bize, Bordenave & Co. The possession of the agent is the possession of the principal. On the transfer to *De Tastet* the plaintiffs acknowledged themselves to be his agents. I am not aware of an instance of a bill of interpleader being sustained by a private agent. It is a very important point, and I permit the counsel to look into the authorities, and mention the result on Monday next.

November 16th.—Mr. *O. Anderdon* for the plaintiffs:—This bill has been filed by warehousemen, whom I cannot represent in any other character than that of agents. The wool was consigned by *Cabanon* to Bize, Bordenave & Co., and after the latter had caused the wool to be transferred to the defendant *De Tastet*, the defendant *Cabanon* claimed the goods as the owner; and in consequence of the lien claimed by *De Tastet*, it appears that there are in this case those conflicting claims arising out of the acts of the parties respecting which the parties ought to be compelled to interplead in this court. Mr. *De Tastet* being a partner with Bize, Bordenave & Co., this comes within the case of conflicting claims, in which the holder of the goods can maintain a bill of interpleader. In the case of *Nicholson v. Knowles*(a) the Vice-Chancellor decided upon the principle of the *cases of *Dickenson v. Hammond*(b) and *Roberts v. Ogilvie*(c) that an agent to receive particular moneys cannot dispute the authority

(a) 5 Mad. 47.

(b) 2 B. & A. 310.

(c) 9 Price, 269.

of his principal and set up inconsistent claims of third persons; but in such cases the receiver of the money would not be liable to an action at the suit of the parties who might be rightfully entitled to it. The plaintiffs ought to be protected in this court, because their delivery of the goods to De Tastet would not be an answer to the action of Cabanon, if De Tastet were not entitled to retain them.

Mr. Koe, referring to the statement that De Tastet was a partner with Bize, Bordenave & Co., objected that it was not stated in the bill that De Tastet was a partner; but the Master of the Rolls thought that the plaintiff was entitled to read the fact from the defendant's answer.

Mr. O. Anderson:—In *Lowe and Richardson v.* —, (a) it was laid down, that “although a captain might file a bill of interpleader where parties claimed adversely at law or in equity under a bill of lading, yet the Vice-Chancellor doubted whether he should in any case file a bill of interpleader where the adverse claims were not under the bill of lading, but paramount to it. Delivery according to the bill of lading would fully justify the captain, and those who alleged an equity paramount to the bill of lading should assert it by a suit of their own.” This appears to furnish the distinction. In *Dowson v. Hardcastle* (b) the plaintiffs were wharfingers, and the other parties were the consignor and consignee, and vendees of the goods; it was held that that was a proper case for a bill of interpleader. So, in *Edenson and *Roberts*, (c) which was the case of a bill of [*181] interpleader by a factor, against many defendants who had claimed the goods, in which the authority of the preceding case was recognized and followed. *Martinius v. Helmuth*, (d) before Lord Eldon, is a strong case to support this bill; and there are other analogous cases. (e)

(a) 3 Mad. 277.

(b) 2 Cox, 278.

(c) 2 Cox, 280.

(d) Reported in a note, 2 Ves. & Bea. 407, (2d edition,) and in Cooper, 245.

(e) The cases of *The East India Company v. Bazett*, 1 Jacob, 91.; *Stevenson v. An-*

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THE MASTER OF THE ROLLS :—You cite many cases ; but how do you state the principle ?

Mr. O. *Anderdon* :—Wherever conflicting claims are raised to property, in the possession of a depositary arising out of the acts of the parties claiming derivatively and in privity ; he, not having the means of ascertaining in whom the right resides, is entitled to the assistance of a court of equity.

THE MASTER OF THE ROLLS :—Must not an agent account to his principal ? How can a stranger maintain an action against an agent, if the latter deliver the goods deposited with him to his principal ?

Mr. O. *Anderdon* :—Unless an agent is held to be not liable to an action of trover by a consignor, he ought to have protection here. In the case of *Sevens v. Elwall*,^(a) a servant was held to be liable to an action of trover. In the case now before the court, the parties who are defendants claim under one title ; and seeing the privity which exists between them, it is submitted that this bill can be maintained.

[*182] *THE MASTER OF THE ROLLS :—The wool being deposited in a warehouse, the warehouseman becomes the agent of the principal, but if deposited in a bonded warehouse, the holder is the agent of the person entitled. When under the authority of the crown, the warehouseman is not a private agent, but a public warehouseman. The difference is, whether it is a warehouse or a public bonded warehouse.

(It was intimated to the court, that the plaintiff's warehouses were bonded warehouses.)

Mr. *Koe* :—But it is stated on the record to be a private warehouse ; that the plaintiffs carry on the business of warehouse-

derson, 2 Ves. & B. 407 ; *Martinius v. Helmuth*, *ibid.*, in note ; and *The East India Company v. Edwards*, 18 Ves. 376.

(a) 4 M. & S. 259.

*1829.—Bingham v. Woodgate.

men. There is nothing on the bill to show that this is a public bonded warehouse. It has been dealt with throughout, as a private warehouse.

THE MASTER OF THE ROLLS:—Where would be the use of dismissing this bill, when another bill on the ground that the plaintiff's is a public bonded warehouse may be brought to-morrow? If this be a private warehouse, the possession would be in *De Tastet*. If the plaintiffs are merely private agents, I am of opinion that they cannot file a bill of interpleader, but if they are public agents, they can file it. The agent of a bonded warehouse must be like the London Dock Company, who are public agents.

The cause then stood over, to enable the plaintiffs to make such application, with reference to the fact of the plaintiff's warehouse being bonded as they should be advised.

November 27th.—Mr. O. Anderdon stated, that with reference to this case, he found that the goods were not deposited with the plaintiffs as bonded goods.

*THE MASTER OF THE ROLLS:—Then the plaintiffs [*188] are only private agents, and in that character they cannot sustain a bill of interpleader.

Bill dismissed with costs.

BINGHAM v. WOODGATE.—HUDLESTONE v. CORBETT.(a)

Customary Estates.—Effect of Purchase of a Tenement in Fee by the Lord, who had only a Life Interest.

WESTMINSTER HALL.—1829: 9th November.

A lord of a customary manor, for life only, purchased a tenement in the manor in fee, by conveyance and surrender. The mode of transmission of lands in the manor was by conveyance and surrender. The lord died, leaving only a daughter.

(a) S., C. 1 Russ. & M. 32.

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ter. The manor, by the settlement under which he held it for life, was limited, in default of sons, in remainder to his brother; and the manor went over to the brother.

Held, that the usual mode of passing estates being by common law conveyance, the freehold was in the tenant.

Held, that on the death of the lord the tenement descended to his daughter, his heiress at law.

SEVERAL lots of land were purchased at a sale before the master in these causes, by Lowther Augustus John Lord Muncaster, and the master was of opinion that a good title could be made thereto. Lord Muncaster carried in objections to the report, which were disallowed, and he thereupon obtained an order that he should be at liberty to file exceptions, which he accordingly did, that a good title could not be made. In fact, this objection amounted to a claim by his Lordship, to the estates of which those lots formed part. The following are the facts.

By the settlement, bearing date the 14th of July, 1778, made on the marriage of John Pennington, Esq., and Penelope Compton, the manor of Muncaster, and other manors therein mentioned, and all head rents, quit rents, of freehold, customary and copyhold tenants, fee-farm rents, and all other rents, [*184] rights, royalties, fisheries, *profits and appurtenances whatsoever to the said manors belonging, were limited to the use of John Pennington and his assigns for life; with remainder to the sons of the marriage in tail male; with remainder to Lowther Pennington, in strict settlement; remainder over. John Pennington was afterwards created Lord Muncaster, and was the testator mentioned in this cause.

As to the Customary Part of Lot 3.

By a customary conveyance, dated 2d February, 1787, Robert Dixon conveyed a customary estate held of the said manor to the use of the testator, his heirs and assigns forever.

The same day, at a court held for the manor, the said Robert Dixon surrendered the said customary estate to the use of the said testator, his heirs and assigns forever.

By an indenture dated 2d February, 1797, the testator granted, bargained, sold and demised (*inter alia*) the said customary estate, by the description of all that other freehold messuage, &c., called "Lowestholme, which was theretofore the estate of Robert Dixon," to Cuthbert Atkinson, his executors, administrators and assigns, for 1,000 years, subject to a proviso for *cesser* of the term on payment by the testator, his executors or administrators, unto the said Cuthbert Atkinson, his executors, administrators, or assigns, of 2,000*l.*, and interest on the 2d February, 1798. And the said deed contained (amongst other covenants) a covenant by the testator that he was seised in fee.

This deed had been cancelled; and upon it was written the following memorandum:—"I have cancelled the *above mortgage with my own hands. Cancelled the [*185] 10th November, 1813. C. ATKINSON."

By an indenture of 8d February, 1812, the testator charged the estate comprised in the said mortgage with the payment of the further sum of 1,500*l.* to the said C. Atkinson. This deed was also cancelled, and a memorandum similar to the last written thereon, and signed by the said C. Atkinson.

The testator, by his will, dated the 11th April, 1812, devised all his manors and real estate to trustees, in trust, to sell the same for the payment of his debts and other purposes.

The testator dying in October, 1813, without male issue, his brother, Lowther Pennington, succeeded to the title, and also to the possession of the settled estates as tenant for life under the deeds of the 13th and 14th July, 1778. The testator had, however, one daughter, who had been married to Lord Lindsay, now Earl of Balcarras.

Lowther Lord Muncaster, died in 1818, and his son, Lowther Augustus John, (then an infant,) succeeded to the title, and also to the settled estates, as tenant in tail under the settlement of 1778.

Lowther Augustus John Lord Muncaster having been made a

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ward of the Court of Chancery, Ralph Creyke, Esq., was appointed receiver of his estates, and empowered to hold the court for the several manors to which his Lordship became entitled upon his father's death.

At a court held 4th December, 1818, for the manor of Muncaster, before the said Ralph Creyke, Lady Lindsay claimed [*186] to be admitted, by descent from her late father, *to the premises forming the customary part of lot 3. And having paid her fine, she was admitted tenant thereto accordingly, to hold to her, her heirs and assigns, "according to the custom of the manor," yielding and performing to Lowther Augustus John Lord Muncaster, lord of the said manor, his heirs and assigns, all rents, &c., usual and accustomed.

Lady Lindsay was considered to be the person entitled to be admitted as the customary heiress to her father, a doubt being entertained whether the customary estates passed to the trustees by the devise in the will.

During the lifetime of Lowther Lord Muncaster, no admission to the property took place; and, as in consequence of this omission, the payment of a fine had been avoided, (the custom authorizing a fine being taken both upon a change of tenant and the death of the lord,) Lady Lindsay was called upon to be admitted to the property a second time, with a view to the payment of the fine which had been payable upon the late lord's death. The following admission accordingly took place.

At a court held 21st July, 1819, before Richard Taylor, as deputy to the said Ralph Creyke, Lady Lindsay was admitted to the said customary premises upon the death of Lowther Lord Muncaster, "the last general admitting lord," to hold to her, her heirs and assigns, according to the custom of the manor. And she paid the customary fine and expenses thereon.

As to Lot 4.

By a customary conveyance of 1st August, 1807, Christopher Brockbank conveyed his customary estate, *held [*187] of the said manor of Muncaster, to the use of the testator in fee.

At a court held the same day, the said Christopher Brockbank surrendered his said customary estate to the testator, his heirs and assigns, according to the custom of the said manor.

At a court held 6th March, 1817, Lowther Lord Muncaster being then the lord of the said manor, Lady Lindsay claimed to be admitted, "by descent from her late father," to the said customary estate, and having paid her fine she was admitted tenant thereto, to hold to her, her heirs and assigns, according to the custom of the manor, yielding unto the said Lowther Lord Muncaster, all rents, fines, &c., due and payable.

On the 17th March, 1817, Lady Lindsay having agreed to relinquish all claim to this customary estate in favor of the creditors of the testator, at a court held on that day, she surrendered the same estate to the use of Richard Taylor, in fee, for the purpose of enabling him to convey the same to a purchaser, or otherwise to dispose thereof as circumstances might thereafter require, without further application to her.

On the same day a customary conveyance of the same estate was executed by Lady Lindsay, to the said Richard Taylor.

On the same day the said Richard Taylor was admitted, in fee, to the same customary estate, pursuant to the said surrender, and paid a fine thereon.

In 1818, Lowther Lord Muncaster died.

*At a court, held 21st July, 1819, for the said manor, [*188] before the said R. Creyke, as steward and receiver of the then Lord Muncaster, appointed by the Court of Chancery, the

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said Richard claimed to be admitted to the said customary estate upon the death of Lowther Lord Muncaster, the last general admitting lord, and having paid his fine, was admitted tenant thereto accordingly.

As to Lot 5.

By a customary conveyance of the 13th February, 1809, William Thompson and Anne Thompson conveyed their customary estate, held of the said manor of Muncaster, to the use of the testator in fee

At a court held the same day, the said William Thompson surrendered the said premises to the said testator, his heirs and assigns, for ever.

At a court, held 6th March, 1817, (Lowther Lord Muncaster being lord of the manor,) Lady Lindsay was admitted, by descent from her late father, to the said customary estate, and paid her fine.

On the 17th March, 1817, Lady Lindsay surrendered to the use of the said Richard Taylor.

The same day a customary conveyance thereof, from Lady Lindsay to Richard Taylor.

The same day Richard Taylor was admitted, and paid his fine.

In 1818, Lowther Lord Muncaster died.

[*189] *On the 21st of July, 1819, Richard Taylor was admitted upon Lowther Lord Muncaster's death.

The following is the certificate of the steward of the manor as to the customary form on which grants were made:—

“MUNCASTER CASTLE, *July 24, 1828.*

“Sir,—The custom of the manor of Muncaster in all cases

requires a customary tenant, on disposing of his customary estate, to execute a conveyance to the purchaser, in addition to the surrender and admission.

"On the lord of the manor of Muncaster becoming possessed of any customary estate within the manor the same would become free, and if regranted to any one, would require a deed of conveyance, but no admission; this if the lord *had the perpetual right in the manor*.

"I cannot find a single instance where the lord of the manor of Muncaster, *holding in perpetuity*, has ever regranted a customary estate within the manor that they become possessed of: every purchase that has been made is still held in the family.

"The above is the custom of the manor of Muncaster.

"I am, &c., RICHARD TAYLOR,

"Steward of the said manor.

"To G. BRAMWELL, Esq., Temple."

Mr. Stuart in support of the exceptions:—John Lord Muncaster was tenant for life of the manor, and being so, he purchased one of the estates in it, which was conveyed to him in fee. Subsequently to his death his heiress was admitted, and it is said that this is a new *grant. The question is, whether [*190] this land is not become parcel of the manor. Is this within the principle of law laid down in *St. Paul's v. Lord Dudley and Ward*?(a) The property there was copyhold; in this it is customary freehold; and unless the counsel on the other side can show there is a difference in the two tenures applicable to this question, the principle in that case must prevail. In that case Lord Eldon said that the legal effect of the tenant for life of the manor taking the surrender of a copyhold to him and his heirs was that the copyhold became parcel of the manor. The equity in that case was in favor of a mortgagee, and he would be entitled to more favor than an heir at law. Now surely the mere admission by the steward, without a grant, could not affect the question. It may be said that, with respect to customary freehold, the freehold is not in the lord, but in the tenant. The question arose in *Doe d. Cook v. Danvers*,(a) in which Lord Ellen-

(a) 15 Ves. 167.

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borough stated that the estate appearing by the cases to be parcel of the manor, to be holden by copy of court roll, and to pass by surrender and admittance, the court held that, whether holden at the will of the lord or not, the freehold was in the lord, and not in the tenant. There must be in the lord a higher interest than in the tenant. It is enough, in order to apply the doctrine of *merger* or extinguishment, that the lord has a higher interest. He being seised of the manor of which the lands are holden, the doctrine of extinguishment must apply. Then it is said that the admission operates as a regrant; but where, as in this case, it was a gratuitous admission by the steward during the infancy of the lord, not preceded by a grant, it would be extraordinary if the act of the steward could undo the operation of the [*191] law. *On the 4th of December, 1818, and in July, 1819, this admission took place. In 1823, Lowther Augustus John Lord Muncaster attained his majority. It may be asked, can an admission during the minority bind him? The effect of an admission was considered in *Doe d. Zouch v. Forse*, (b) where Lord Ellenborough says, an admittance to a copyhold does not in itself constitute a possession; it only gives the party the means of possession if he have a good title to it. Unless the erroneous admission operate as a new grant, he can have no title at all; but it would be too much to say, that that which was an admission upon a claim in a particular character, being vicious in that respect, shall operate as a new and express grant, which neither the lord nor the tenant ever contemplated at the time. And there are other cases which have also decided the point; (*Holdfast d. Woollams v. Clapham*). (c) The admittance is only a circumstance required by law merely for the sake of the lord. It is said that it is likened to confirmation at common law; but as laid down in *Shepard's Touchstone*, 313, confirmation must have something to operate upon. The admission of Lady Lindsay cannot have altered this question, and the exceptions to the master's report must be allowed.

(a) 7 East. 299.

(b) 7 East. 186.

(c) 1 T. R. 600.

Mr. Knight, Mr. Simpson and Mr. Preston, for the plaintiff.

Mr. Knight:—These estates were held of the manor either as freehold or copyhold. It is essential to a copyhold tenure that it should be held at the will of the lord, but customary freehold is not so held. The very foundation of the case of *St. Paul's v. Lord *Dudley* fails in this instance, for there [*192] the estate was copyhold, which the law looks upon as an estate at will; but this estate is not of that description. In this manor the lands are conveyed by deed from the vendor to the purchasers, accompanied, indeed, by surrender and admission; and it may be asked, whether in any case where a deed is the necessary assurance, the lands can be treated as copyhold? This land is not copyhold in the ordinary acceptance of the term; no instance can be adduced from the rolls of this manor of an admission at the will of the lord. Why is it that a copyhold will pass by an unattested will? Because it is only a declaration of use; but the Statute of Frauds is not so satisfied with a will of customary freeholds. The case of *Hussey v. Grills*(a) was a decision of Lord Hardwicke's on a will and an unattested codicil, and the codicil was held to be inoperative. Lord Hardwicke said, that customary freeholds and copyholds differed extremely in their nature. The latter were of a base tenure, and by the old common law were held at the will of the lord; customary freeholds never were of that base kind: the foundation of the determination as to copyholds was, that the party might dispose by surrender and will; but when the legal estate of customary freeholds could not be passed in that way, there was no reason to hold them out of the Statute of Frauds. How can the Statute of Frauds apply, unless the property be freehold, *Willan v. Lancaster*?(b) It is true, that the statute of 31 G. II, c. 14, enacted that customary freeholders had no right to vote for knights of the shire, and that very circumstance of an act of Parliament being necessary shows the state of the law.

*The seignory was suspended, and not merged or [*193]

(a) Ambl 299.

(b) 3 Russ. 108.

extinguished. It revived on the death of the lord. The cases are brought together in Littleton's Commentaries. There have been effectual admittances to this property; two in the lifetime of the late lord, and one in the time of the present lord. It has been said by Mr. *Stewart*, that the admittance does not affect the rights of the claimant, and this is most true as between copyholders themselves; but when the lord of the manor admits, that admittance may be pleaded at law as a grant and admittance: this is laid down by Lord Coke.

Mr. *Simpkinson*.:—This is an estate which requires a deed to pass the freehold interest. In this case it is clear that there was no extinguishment; in *Doe d. Cook v. Danvers*,^(a) no other form was requisite than surrender and admission, and, therefore, Lord Ellenborough held it to be of the same description as copyholds; but here the tenant must execute a deed by which nothing can pass but a freehold. The case before the court, is a case *per se*, for here the freehold was in the tenant; and the effect of a lord of a manor for life purchasing a tenancy in fee could only be suspension. If, indeed, this is to be viewed as a copyhold, even then the admission is a regrant; and, although one of these grants was in the minority of the present lord, yet it was made by the steward, and that is sufficient.

Mr. *Preston*.:—It is an error to confound *merger* with extinguishment. Comyns, in his Digest, tit. Suspension, says, "If there be lord and tenant, and the tenant grants his tenancy to A. for life, and then the lord grants his seignory to A. in fee, the [*194] seignory will be suspended *during the life of A." If there be an estate tail in the lord, and he buys the fee of a tenancy, or *vice versa*, there is only a suspension; but the law of copyhold is different, and the lord may regrant copyholds, though the tenement be extinguished for a time.

These are not copyhold tenements, for they are not held at the will of the lord; but the case before the court is of customary

(a) 7 East. 298.

freehold, and it is a question of fact whether the freehold be in the lord or the tenant. On the evidence of this title, the freehold is in the tenant. There could have been a suspension only of the tenement during the time it was in the lord. The conveyance is in this case by bargain and sale, and that is not a mode of conveying a copyhold. A use may be limited on a bargain and sale made under the custom of London, for it is a common law conveyance. It is impossible to read the passages on copyhold in Blackstone, and not to conclude, that in Bracton's time, the customary tenants of this description had the freehold. It was only for election purposes, that the contrary was declared by the Legislature. The forms of grants in these manors, which are certified, is, that there must be a *customary* conveyance previous to surrender and admission. In *Crowther v. Oldfield*,^(a) the doctrine laid down by Lord Holt was, "That the customary freeholder was admitted *ad consuetudinem manerii*, and not *ad voluntatem domini*, as a copyholder was. The copyholder was in by demise from the lord. But in the case of customary freeholds, the lord was only an instrument; and, in pleading a title to a copyhold estate, it was sufficient to show a grant from the lord; but, in the other case, it was not enough to show that *the lord granted, or that it was surrendered to the lord, [*195] and he granted, but it must be shown that the surrenderor was seised in fee, and surrendered to the lord, and he granted." As to customary freeholds, there must be a deduction of title by conveyances, as in cases of freehold by socage tenure. In a case in the Court of King's Bench, the law was collected and stated by Mr. Justice Holroyd, then at the bar. In argument he observed, "There is one most particular circumstance regarding copyholds, which does not apply to customary freeholds—it is, that the lord of a copyhold may regrant a copyhold, and if this were copyhold, it would have passed by the regrant; but there is not any case of a lord in fee of a customary freehold purchasing a tenement in fee, where it was held that he could regrant it." It is impossible he could regrant, the custom is extinguished by the union. What follows? If there be an extinguishment, it

(a) 1 Salk. 364.

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cannot be qualified. But can anything be so absurd, than that, where a tenant for life of a manor purchases a tenement in fee, there shall be an extinguishment and a right to regrant. It would be injustice in the highest degree. That there is only a suspension, is established by the authorities. Littleton, at sec. 560, says, 'If there be lord and tenant, and the tenant grant the tenement to a man for the term of his life, the remainder to another in fee, if the lord grant the services to the tenant for life in fee, in this case, the tenant for the term of life hath a fee in the services, but the services are put in suspense during his life, but the heirs of tenant for life shall have the services after his decease;' and in Comyn's Digest, title Suspension, the law is thus stated, 'If A. be tenant for life, remainder to B. in fee, and the lord grants his services to A. in fee, they are suspended during the life of A.'"

[*196] *This tenement is not copyhold, it is held by deed, the freehold is in the tenant; but whether it be or not, this is not copyhold, (the steward's certificate was here read.) Extinguishment cannot be completed unless the estates are co-equal. The lord can no longer, under the statute *quia emptores* regrant to be held of the manor, *Doe dem. Dewby v. Jackson.*(a)

THE MASTER OF THE ROLLS:—That is obviously what the steward means, for he says it requires no admission.

Mr. Preston:—If the tenancy be extinguished, every one must feel the hardship of the case before the court. The moment this property is treated as a customary freehold, whether the freehold be in lord or tenant, the law of copyholds cannot apply. The title of the tenant is by conveyance. The tenement was suspended during the life of the lord. On the death of tenant for life, the tenement would revert to his heir.

Mr. Roupell and Mr. Lynch, in the same interest:—The freehold being in the tenant, the law relating to copyhold cannot apply;

(a) 1 B. & C. 455.

and there could only have been a suspension, not an extinguishment.

THE MASTER OF THE ROLLS:—The admission of Lady Lindsay could not be a regrant. It was only an admission, unless it could be shown that there was a custom in the manor that it could be a regrant. I must take this property to be a freehold, from the certificate of the steward.

*Mr. *Pepys*, in reply:—In *Doe v. Danvers*, the tene- [*197]
ment was not held at the will of the lord, but that is merely a form. In both instances the custom of the manor prevails. There is no distinction between this case and that of *Lord Dudley* and *St. Paul's*. The conveyance to Lord Muncaster is thus worded, "bargain, sell and surrender." A lord of a copyhold manor may sell any tenement in his hands by deed, but that would be enfranchisement. *Doe dem. Reay v. Huntingdon.*(a) Lord Muncaster appearing here as a purchaser, is entitled to the same title as any other purchaser would be. I apprehend the admission of Lady Lindsay could have no effect. It was the admission of a person who had no title; unless a distinction can be drawn between customary freeholds and copyholds, the case of *St. Paul's* and *Lord Dudley* must apply.

THE MASTER OF THE ROLLS said, that he must consider this case as if Lord Muncaster were not the purchaser. In this case, the lord of a manor, who was tenant for life only, with remainders over, purchased three customary tenements which were held of the manor, and those tenements were passed to him by a conveyance of bargain and sale, and by surrender, it being the custom of the manor that such customary tenements should pass by bargain and sale, and surrender and admittance, admittance not being necessary where the lord is a party. These three tenements had been sold before the master, under a decree of this court, as being part of the estate of the lord tenant for life, who purchased them: and on a reference to the master as to the title

(a) 4 East 271.

of those tenements, the master has reported that a good [*198] title can be made, and *an exception is taken to the report, on which exception judgment is now to be given. As it is admitted that a bargain and sale is absolutely necessary, in order to pass the interest in these customary tenements, it necessarily follows, in my apprehension, that they are freehold, otherwise it would be impossible that a bargain and sale should be necessary in order to pass the interest in the property. Considering these to be freehold in point of interest, it follows that the cases of *St. Paul v. Lord Dudley* and *Doe v. Danvers*, have no application. In both these cases, there was no freehold interest in the tenements purchased. Assuming, therefore, as clear, that these tenements were freehold, the simple question is, what is the effect of the union of the customary tenements in fee, with the interest of the lord who is tenant for life only? If the lord had been tenant in fee of the manor, then the purchase of those customary tenements in fee would undoubtedly have extinguished the customary tenement, and made it parcel of the manor so as to pass with the manor; but extinguishment takes place only when both estates have the same duration, and inasmuch as the lord, when he purchased the customary tenements, was tenant for life only, it was no extinguishment, but it was a suspension of the seignory during the life of the lord, and this seignory would necessarily survive to the remainder-man on the death of the lord; and on the death of the lord, it appears to me quite clear, that those customary tenements would descend to the heir of the lord; and, undoubtedly, the heir of the lord, according to the custom of the manor, would require admittance to perfect the title. Admittance in this case has been had. I am of opinion, therefore, that the master was perfectly right in the conclusion which he has adopted; and I must overrule this [*199] exception. The doctrine of suspension and *extinguishment is very fully stated by Littleton in sections 559, 560, 561.

Overruled with costs.—Reg Lib. A. 129, fol. 164.

THE REV. EDWARD DAVIES, AND MARY ANN, HIS WIFE, *Plaintiffs*; AND JOHN SPURLING, THE ELDER, BENJAMIN COLCHES-
TER, JOHN SPURLING, THE YOUNGER, AND WILLIAM BRADEY,
Defendants.(a)

*Avoiding Release.—Opening Accounts.—Fraud and Surprise.—
Liability of Executors.—Error Detected and Settled before Suit.—
Costs.—Evidence.—Reading Answers.*

WESTMINSTER HALL.—1829: 28th November.

Accounts having been settled and a release executed, in order to avoid the latter, and obtain an account in this court, the plaintiff must establish either fraud or surprise.

One of several executors receiving part of the personal estate, which he hands to his co-executor, who wastes the estate, still remains personally liable; but because he happens to be executor, he is not liable for moneys which he received for the purchase of a freehold estate of the testator, and which he received as the agent of another person empowered by the will to sell it, to whom he had paid over the amount, but is perfectly justified in so paying it over.

In order to induce the court to give a decree to surcharge and falsify, some one mistake must be shown.

If an error is detected, and settled before the institution of a suit, it is not a foundation for a decree to surcharge and falsify.

Bill seeking relief on the ground of fraud or surprise—plaintiff failing to establish either—dismissed with costs.

WHIMPER BRADEY, by his will, bearing date the 3d June, 1809, gave all his freehold and copyhold lands, except his freehold and copyhold parts of the church farm, (to which they were entitled in moieties in fee,) unto his brother, John Bradey, for his life; with remainder to the plaintiff, Mary Ann Davies, then of the age of four years, in tail general. The testator then declares, that if his brother should be minded to sell the church farm, he empowered him to sell all his parts and shares thereof; and if the same should not be sold in his lifetime, then the testator directed and empowered the *surviving exe- [*200]
cutors, as soon as might be after his brother's death, to sell and convey the same premises. The produce to be applied

(a) 2 Edw Ch. Rep. 17.

in like manner as the testator's personal estate. And the testator gave all his goods, chattels and personal estate, and also the clear money arising by the said sale, unto his brother, John Bradey, for his life, and after his death unto the plaintiff, Mary Ann Davies. The testator appointed John Bradey, and defendants John Spurling and Benjamin Colchester, executors of his will, and as far by law as he could, the testator committed to defendants Spurling and Colchester the custody and tuition of the plaintiff, Mary Ann Davies, and the management and improvement of the real and personal estate by him devised and bequeathed to her, and the application thereof at their discretion, for her maintenance and education during her minority. Testator gave to Spurling and Colchester 50*l.* apiece for their trouble.

The testator died in February, 1817, and his will was proved by the three executors.

John Bradey sold the church farm for 6,450*l.*

Benjamin Colchester, being by trade an auctioneer, sold the estate and *received the purchase money.*

John Bradey, by his will, bearing dated the 17th day of May, 1821, gave the greater part of his lands unto the defendants Colchester and Spurling the younger, to the use of them and their heirs, during the life of the plaintiff, Mary Ann Davies, upon trust to pay her the rents independent of her husband; and, after her decease, to the use of her children, or more remote issue as she should appoint; and in default of appointment, to the children, in fee, with an executory devise over.

[*201] *The testator gave his personal estate to the plaintiff Mary Ann Davies, to be paid to her when she should attain twenty-one; a competent part to be applied to her maintenance and education during her minority.

Spurling the elder, Colchester, and Spurling the younger, were appointed executors and guardians of the plaintiff, Mary Ann

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Davies, during her minority. On the death of John Bradey, his executors duly proved his will, and the plaintiff, Mary Ann, was then sixteen years of age.

John Bradey, up to his death, occupied and farmed a copyhold estate called Hollesley, which, in the lifetime of Whimper Bradey, was their joint property.

In August, 1821, an amicable suit was instituted in Chancery, for establishing the will and executing the trusts under which Spurling the elder, Colchester, and Spurling the younger, were, by the court, appointed guardians of the plaintiff, Mary Ann Davies.

The executors of John Bradey put in their answer with schedules of accounts, but no further proceedings were had in the suit. Mary Ann Davies, on attaining twenty-one, married the plaintiff, the Rev. Edward Davies.

This bill stated the preceding facts, and charged that a release given by the plaintiffs was executed through fear and misrepresentation, and prayed that the wills of Whimper Bradey and John Bradey might be established, and the trusts carried into execution, and that the settlement of accounts and the release, might be declared fraudulent and void.

It was stated in the answers, that John Bradey alone during his life, acted as executor and trustee of the *will [*202] of Whimper Bradey, and that Spurling the elder and Colchester never, in any manner, acted or interfered in the execution of the will of Whimper Bradey, except by joining with him in signing the residuary account rendered to the stamp office; that Benjamin Colchester was an auctioneer, and was employed by John Bradey to sell the estate, and he did sell it for 6,450*l.*, which he paid into the bank at Woodridge to the account of John Bradey. John Bradey, by his check on that bank, paid Spurling the elder the sum of 2,800*l.*, in discharge of four bonds to that amount, entered into to him by Whimper Bradey and John Bradey.

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The answers further state, that on the 9th February, 1826, the accounts were investigated by Wm. Chapman, on the part of the plaintiffs; and that thereby the sum of 666*l.* 6*s.* 7*d.* appeared to be due to the plaintiff, Mrs. Davies, exclusive of 700*l.* 3 per cent. consols; that a draft of the release was, on the 15th February, delivered to Mr. H. G. Day, the then solicitor of the plaintiff, Edward Davies. That the parties and the plaintiffs' accountant, Mr. Chapman, met again on the 17th February, when Mr. Davies signed a memorandum at the foot of the draft as follows: "I have heard this draft release read, and do approve the same, and do undertake to execute a copy thereof when engrossed on the proper stamp. EDWARD DAVIES. Witness, H. G. DAY."

Spurling the elder, and Colchester, at the request of the plaintiff, Mr. Davies, then executed a power of attorney to sell out the 700*l.* stock, in order to pay some bills of Mrs. Davies, and make some other necessary payments; and on the 24th day of February, 1826, the accounts, with the subsequent receipt and payments, were fully gone into and settled, the release executed, and the balance paid to the plaintiffs.

[*203] * These statements in the answer were supported by evidence.

At the foot of the accounts then produced there was written the following memorandum:—

"The foregoing accounts in this book having been examined by Mr. William Chapman on our behalf, and we being satisfied therewith, and having this day received the balance of 358*l.* 8*s.* 2*d.* from the executors, do hereby allow the said accounts. As witness our hands, this 24th day of February, 1826."

The plaintiffs' attorney was present, and the plaintiffs signed this memorandum.

It appeared also in the answer of Colchester, that the defendant Colchester had received from John Bradey the sum of 177*l.*,

with which he was to purchase two cows for a relation of John Bradey, and to make some other payments; the remainder he was to keep to himself; and this defendant stated in his answer that he found a paper, which he set forth, amongst the papers of John Bradey, to that effect; but in the month of March, 1826, considering that he ought to communicate the fact to the plaintiffs, he went to their solicitor, and stated all the circumstances to him, offering to do as Mr. Davies wished. Mr. Davies wished to receive the balance, amounting to 132*l.*, and that sum, with interest, was paid to him in April.

The evidence that was material is fully stated by the Master of the Rolls in his judgment.

Mr. Bickersteth and *Mr. Parker* for the plaintiffs.

Mr. Knight and *Mr. Turner* for the defendants.

*Whilst counsel were reading evidence from the answer at considerable length, the Master of the Rolls stated that there had been great abuses in the modern practice regarding answers. If, said his Honor, the plaintiff reads a particular passage, and the defendant refers in the same passage to matter that is explanatory, the defendant has a right to read the explanatory matter; but unless the sense be connected, it is not necessary to read on, merely because such words as "but," "however," "and" were used. [*204]

It was stated by the counsel on both sides, that very considerable expense was incurred in the examination of witnesses, by reason of the mode which, for some time, had been adopted in drawing answers, by connecting various passages, however independent the facts contained in them were of each other. And all the counsel expressed their satisfaction that the court had laid down a rule upon the subject.

His Honor afterwards added, if you read a passage in an answer to charge the defendant, and it is, by a connecting passage, satisfactorily met by the defendant, you must discharge him by the same answer.

THE MASTER OF THE ROLLS :—This is a bill filed by the plaintiffs for the purpose of avoiding a release which they have executed on the settlement of accounts between the plaintiffs and the defendants, and of having the accounts retaken under the decree of this court.

In order to avoid the release, and to obtain an account under the decree of this court, it is necessary that the plaintiffs should establish that there was either fraud or surprise in the settlement of the accounts upon which the release proceeds.

[*205] *Surprise is certainly not established in this case, because previous to the execution of this release, namely, on the 10th February, 1826, the accounts were examined by an agent appointed on the part of the plaintiffs for that purpose, and with those accounts they expressed themselves perfectly satisfied. Subsequently, about seven days afterwards, a draft of the intended release, proceeding upon that settlement of accounts, was approved by the solicitor of the plaintiffs, and the release was afterwards executed, on the 24th February, in the presence of that solicitor for the plaintiffs, who had approved of the draft of the release. There is, therefore, no ground to state that this release on the settlement of the accounts proceeded upon surprise. The remaining question for the purpose of opening the accounts is, whether it proceeded upon any fraud upon the part of the defendants.

It is said to be plain that there was fraud on the part of the defendants, because on the day that this release was executed, namely, on the 24th February, there was a written assurance on the part of the defendants, that the accounts which ascertained the balance stated in the release, had been fully examined by a

Mr. Chapman, and approved by him; and that it was in consequence of that examination and approval, that the plaintiffs did in fact execute the release. But it does appear to me that this was no fraud on the part of the defendants, nor did it in any manner mislead the plaintiffs, or induce the plaintiffs to sign the release in question.

Mr. Chapman had examined these accounts, as he says, on the 10th February, as it is proved by other witnesses, the examination took place on the 9th February, and in his examination he states a balance of 700*l.*, and a fraction as being then the result of the accounts. The balance as stated by Mr. Chapman, is a *balance which does appear to have been due [*206] from the defendants, up to that 9th February, upon the account on which his examination proceeded, and there is in that respect, therefore, no difference between the parties. The balance that was actually due on the 24th, when the release was executed, was a different balance from that which was stated by Chapman, there having been additional articles on both sides of the account. Now it appears that the plaintiffs were perfectly well aware, that there were such additional articles on both sides of the account. In truth those additional articles were the result of a desire expressed by the plaintiff, Mr. Davies, that certain debts which had been incurred by his wife and co-plaintiff, should be discharged before the final settlement of the accounts, and the execution of the release took place. It appears to have been stated, that Mrs. Davies had incurred certain debts to the amount of 200*l.* or 300*l.*, and it was then made a question, whether the settlement of the accounts should be concluded, and it should be left to Mr. Davies, he being then married, to pay those debts, or whether those debts should be paid by the defendants, the executors? And it was at the request of Mr. Davies himself, that the executors undertook the payment of those debts. Now, in order to pay those debts, it was necessary to provide means: it became necessary to sell a certain sum of stock which stood in the names of the executors, and with that stock those debts were paid. The additional articles to the account are, therefore, on the one side, the money produced by the sale of that stock, and

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on the other side, the application of those moneys to the payment of the debts. It appears that those additional articles were submitted to Mr. Day, the solicitor on the part of the plaintiffs; that he was apprised of them; and that they were fully explained to Davies himself on the day that he executed [*207] *the release. In this respect, therefore, although the memorandum is certainly incorrect—because, according to the memorandum, the whole accounts had been examined by Chapman, whereas in fact the accounts examined by him extended only to the 9th February, and not to those additional articles—yet it is plain that the parties were fully aware that by the examination of the accounts by Mr. Chapman, was meant that examination only which Mr. Chapman had actually made, and that it was not meant to include those additional articles, which had been inserted principally at the request of the plaintiff himself, after the examination by Mr. Chapman. On this ground, therefore, it is not to be stated that there was any fraud. It is said, however, that there was fraud, because the plaintiff, Mrs. Davies, was entitled not only to an account of the estate of John Bradey, but an account of the estate of Whimper Bradey, and that the only account which Mr. Chapman examined was the account of the estate of John Bradey, and the information, therefore, with respect to the estate of Whimper Bradey, to which she was entitled, was not duly afforded. It appears from the evidence that John Bradey was one of the executors of Whimper Bradey, with two of the defendants, and that he was in truth the sole acting executor of Whimper Bradey; that he possessed the whole of his property, and alone administered that property. It is quite immaterial, therefore, whether there was any correct examination of the accounts of the estate of Whimper Bradey, because as John Bradey had alone administered that estate, whether he had administered it properly or improperly, he was the person whose assets must answer for his administration; and if the whole of the assets were administered, it was perfectly immaterial what had been the administration of the estate of Whimper Bradey.

[*208] *Then, let it be said that his administration was most

incorrect, the estate of John Bradey must answer for that incorrectness. It could answer for that incorrectness only to the extent of his property, and the account of the estate of John Bradey, therefore, would be all the plaintiffs could obtain, whatever had been the mal-administration of the estate of Whimper Bradey. It is not stated in the evidence, but it is perfectly manifest that it must have been fully explained to the plaintiffs, because the release itself purports to be a release, not as to the estate of John Bradey alone, upon whose accounts the release proceeded, but as to the estate of Whimper Bradey also. Now, the plaintiffs could never have executed that release, taking the balance of John Bradey's estate, as the balance of the two estates, except the circumstance which I have stated had been fully explained to them, and the extent of that demand had been shown to be necessarily confined to such balance as should appear to be due from the estate of John Bradey. All the information, therefore, that was essential to the justice of the case must, upon the facts, be taken to have been given to the plaintiffs before they executed this release. But it is said, although the plaintiff might have no remedy with respect to the administration of John Bradey, except to the extent of the property, and taking the whole of his property, they could take nothing else as it regarded him, yet still there might have been a mal-administration on the part of the executors, which would have made the executors personally liable; and the material ground upon which that statement is made, raises a question of some nicety and difficulty. Whimper Bradey and John Bradey had been partners in their farming concerns. They were partners in the property upon which those farming concerns were conducted. They had in moieties a considerable estate. *Whimper Bradey, by his [*209] will, making John Bradey one of his executors, also gave him a power to sell the moiety of an estate which they held jointly, for the purpose of converting it into personal estate, and John, after the death of Whimper Bradey, accordingly executed that power. He sells that moiety of the estate, and he sells also his own moiety of the estate. He puts up the whole estate to sale, and it produces a sum of 6,450*l*. In this sale he employs one of the defendants, who was a co-executor with him under the

will of Whimper Bradey, and was an auctioneer. He employs him for the purpose of the sale of this estate. It so happens, that there is no price bid at the auction which is thought a reasonable price for this property, and it is afterwards sold by private contract by the defendant, the auctioneer; who is subsequently employed by John Bradey, as his agent, to receive the money from the purchaser; he accordingly does receive the 6,450*l.* and pays it over to John Bradey.

Now it is said, that, having received this 6,450*l.*, and being an executor under the will of Whimper Bradey, who had desired that his moiety of the estate might be converted into personal estate, he ought never to have parted with the produce of that moiety which Whimper Bradey's share had produced, but that he should have retained it as executor under Whimper Bradey's will, for the purposes of his will, to be administered in the payment of his debts; and that, having paid it over to John Bradey, if John Bradey had been guilty of any mal-administration of this property, so handed over to him by his co-executor, he, as co-executor, was to be answerable for John Bradey's mal-administration. Now, it is extremely true, and perfectly well settled upon the principles of this court, that if there be
[*210] more than one executor, and one executor receives *part of the personal estate, and afterwards hands it over to a co-executor, who wastes the property so handed over to him, the executor who did hand it over, is personally liable for the abuse of trust in the other executor; because, having once possession of the money, it was his duty to see that it was secured, so as to be properly applied in administration, and he ought not to have given to his co-executor the power to waste it.

That principle is perfectly well settled, and the question is, whether it reaches this case? The co-executor, who receives money in that character, has a legal right to retain it against his co-executor; and it being his duty to protect the property in respect of which this trust of executor is reposed in him, if he does not protect the property, but places it in a situation in which it may be wasted, then he is to be answerable; but he is to be

answerable because he had the legal right to retain it, and he did not avail himself of that legal right, but handed it over to his co-executor, who wasted it. Now, had this defendant, the auctioneer, a legal right to retain this money from John Bradey? He possessed it in the sole character of agent of John Bradey. As executor, he never could have possessed this money; it was the produce of the real estate, which partly belonged to J. Bradey and partly belonged to Whimper Bradey, who, by his will, had authorized John Bradey to sell that moiety of the estate which was his property. The auctioneer or agent, therefore, who received this money in its passage from the purchaser to the vendor, John Bradey, did not receive it in the character of executor. As he received it in the character of agent of John Bradey alone, he never could have legally retained it against John Bradey, if John Bradey had thought fit to take proceedings for the purpose of compelling him to pay to J. Bradey the *amount of that money. Now this being the case, I [*211] am of opinion that the auctioneer, the defendant, the co-executor, was perfectly justified in paying over the money to John Bradey; and that if there were any mal-administration of that property by J. Bradey, that he, the co-executor, is not liable in that respect.

It was said, also, that there was mal-administration by John Bradey of his brother's estate, with respect to the payment of a certain debt due to the co-executor, Spurling.

In order to establish that fact of mal-administration, the only evidence resorted to on the part of the plaintiffs was the answer of the defendant; but the answer of the defendant, that part of it which was necessarily read, not only amounted to evidence of the existence of the debt, but of the legal right of Mr. Spurling to claim that debt of John Bradey, partly in his own right, and partly as executor to his brother, it being a joint debt due from the two brothers to Spurling. Now the plaintiffs have no other evidence than the answer, and the answer discloses a case which makes out the payment to be a most correct payment. It is not necessary to make any further observations on the subject, be-

cause the evidence by which a debt is proved, at the same time proves the correctness of the transaction with respect to it. There is, therefore, not only no surprise with respect to this release, and no ground for opening the accounts on that head, but there is no fraud established, upon which the court would be justified in avoiding the release, and in opening the accounts. But then it is said, that if the case be not sufficiently strong to open the accounts, it is yet sufficiently strong to induce the court to give a decree to the plaintiffs to surcharge and falsify those [*212] accounts. Now, in order to induce the court to make a decree that the plaintiffs are to be at liberty to surcharge and falsify accounts, it is necessary that there should be established, in the progress of the suit, some one mistake with respect to an item in the accounts. It is not necessary for that purpose to establish more than one mistake, it being, in the view of the court, a reasonable inference, that if there be one mistake there may be many mistakes; and the plaintiffs, therefore, ought to have the liberty of entering fully into those accounts, with a view to proving other mistakes. It happened that Mr. Colchester, one of the defendants, the executor, was also the agent of John Bradey. He was an agent employed by him in the management of the farming concerns, and at the death of John Bradey there was in his hands a sum of money, [174*l*.] which was due from Mr. Colchester, as agent to John Bradey. It appears in evidence that John Bradey, shortly before his death, had told Mr. Colchester, that he was to make a particular application of part of this property in favor of some of his relations, and that he was to keep the residue for his own use and benefit. And it appears further, that there was found amongst the papers of John Bradey a written memorandum, by which Mr. Colchester was authorized to make these payments in favor of the relations of John Bradey, and was desired to retain the rest. Mr. Colchester, acting upon these facts, did not, when the accounts were made out, which Mr. Chapman examined, introduce any part of this sum of 174*l*. into the accounts; but about a fortnight afterwards he disclosed to the plaintiffs the particulars of this transaction, and explained to them that he did not introduce that sum into the accounts, because he considered that he was acting fairly ac-

ording to the directions of John Bradey, by retaining to his own use that part of it which John Bradey had not directed him to apply to the benefit of his relations; that, therefore, he *had not introduced it into these accounts, and that there [*213] was, after the application in favor of John Bradey's relations, a balance of 132*l*. remaining in his hands; that if the plaintiff (Mr. Davies) thought that he, Mr. Colchester, ought not to retain this 132*l*. for his own benefit, he was quite ready to pay it to him; and he left it to Mr. Davies to say how he should apply this sum of 132*l*. The plaintiff, Mr. Davies, thought that, under the circumstances, he was justified in demanding from Mr. Colchester this 132*l*, and it was accordingly paid to him by Mr. Colchester within a short period after this release was executed, and the accounts settled. Now it is said that if this 132*l*. had not been paid over before the institution of this suit, but in the progress of the suit, it would have been a plain error in Mr. Colchester's account that he had kept back this 132*l*, and that if it had been established in the suit, the court would necessarily have been driven to a decree to authorize the plaintiff to surcharge and falsify the accounts. That is perfectly true, supposing the court should be of opinion that Mr. Colchester was not justified in retaining it, and for the purpose of considering the argument of the plaintiffs, it may be conceded that Mr. Colchester was not justified in retaining this 132*l*. The plaintiff contends that it makes no difference that that sum was paid previous to the institution of the suit, because it was equally an error in these accounts; and, consequently, that notwithstanding the previous payment, the plaintiffs are now entitled to a decree to surcharge and falsify.

I cannot follow the reasoning of the plaintiffs in this case. If, in the progress of a suit, an account upon which the defendants insist, is proved to be in any degree erroneous, even in any one item, then *the plaintiffs are entitled to a de- [*214] cree to surcharge and falsify; but here the plaintiffs have not established, in the progress of this suit, that there is any error in the account.(1)

(1) A settled account can be opened only for fraud or errors specified, and which are palpable or clearly proved. *Baker v. Biddle*, Baldwin's C. C. Rep. 418. It can

There was originally an error in the account, but this error has not been detected in the suit; the plaintiffs, therefore, are not relieved under the decree of the court against this error, but by an arrangement made out of court this error has been cor-

only be surcharged or falsified by the plaintiff, and is not affected by being introduced into a subsequent account. *Ib.* A defendant is not entitled to open an account unless a sufficient foundation has been laid in the answer for that purpose. *Slee v. Bloom*, on appeal, 20 Johns. Rep. 669; *S. C.*, 5 Johns. Ch. Rep. 366. The court will not open a settled account where it has been signed or a security taken on the footing of it, unless for fraud or errors distinctly specified and proved. *Botifew v. Weyman et al.*, 1 McCord's Ch. Rep. 156. Where an account has been settled by arbitrators, and a bond and mortgage given for the sum awarded to be due, the court will not, except in case of gross wrong, permit the account to be re-investigated, or the validity of the award to be contested. *Johnson's Executors v. Kelchum*, 3 Green's Ch. Rep. 364. After a judgment, execution and sale, under a mortgage bond, the court will not open the account on the mortgage, though there be some degree of irregularity in the accounts, if they appear to be fairly closed. *Bloodgood v. Zeily*, 2 Caines' Cas. 124. The final account of an administrator has not the conclusive effect of a judicial sentence between him and the distributees of the estate, and does not bar them from proceeding in Chancery to open, falsify and surcharge the account. *Vertner v. McMarran*, Freeman's Ch. Miss. Rep. 136. If an administrator render a false or fraudulent account, the proper remedy is by a bill to surcharge and falsify the account; and such a bill ought to point out the errors, omissions and false charges complained of. *Miller v. Womack's Administrators*, Freeman's Miss. Ch. Rep. 486. Where a bond has been given on the settlement of an account, and the obligor complains of errors in the account stated, he can only be relieved upon a clear exhibition of such errors. *Redwan v. Green*, 3 Iredell's Eq. Rep. 54. Where a merchant, in embarrassed circumstances, borrowed money at different times from his confidential clerk, who took various bonds and securities for such loans, and for which, by agreement, he was to be allowed usurious interest, and during the period of ten years the parties from time to time came to a settlement of their accounts, and the merchant gave his bond and further securities for the balance of principal and interest, the court ordered all the multiplied obligations and settlements to be set aside, and the whole accounts at large to be opened between the parties from the commencement of their dealings; it appearing, in this case, that there was proof not only of mistakes and deficiencies in their accounts, but there were many suspicious circumstances leading strongly to an inference of usury, oppression and fraud. *Barrow v. Rhineland*, 1 Johns. Ch. Rep. 550. Where the charges in the bill are specific, setting forth the items of the accounts with their dates, on an order of reference for an account, the inquiry is not to be opened beyond the special matter charged, although the bill may contain a general charge, at the conclusion, and a prayer for a full account concerning the premises. *Consequa v. Fanning*, 3 Johnson's Chancery Reports, 587; *Same Case*, on appeal, 17 Johnson's Reports, 511. If complainant opens a stated account and falsifies certain charges in it, the defendant must be allowed to correct any errors; as to set right

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rected. The error having been corrected out of court, and before the institution of the suit, I am of opinion that it is not a foundation upon which the court ever has, or ever would be jus-

a mistake in the rate of interest. *Higginson et ux. v. Fabre's Executors*, 3 Desau. 92. Where accounts had been stated between parties at different times, without fraud or coercion, and the statements were accompanied with written agreements showing how they should be binding, and for what cause they should be varied, the party was held to the terms of such written agreements; and the accounts were opened so far only as the terms of those agreements extended. *Troup v. Haight*, Hopk. 239. Where an interlocutory order for an account, is not reheard or prayed to be reheard, it ought to be taken as a declaration, that the plaintiff is entitled to the account prayed for. *Bailey v. Wilson*, 1 Dev. & Batt. Rep. 187. Long acquiescence in an account makes it a settled one. Stale demands are not favored in equity. *Tilgham and wife v. Tilgham's ex'rs*, 1 Baldwin's C. C. Rep. 495. A settled account can only be opened for fraud or errors specified, and can only be surcharged and falsified by the plaintiff. *Baker v. Biddle*, 1 Baldwin's C. C. Rep. 418. A court of Chancery should not investigate the items of an account; they should be referred to a master; and in accounting before a master, should not be received to support charges, which, from their nature, admit of full proof. *Harding v. Handy*, 11 Wheat. 103. A complex and intricate account, is an unfit subject for the examination of a court, and ought always to be referred to a commissioner to be examined by him, and reported in order to a final decree. *Dubourg De St. Colombes' heirs v. United States*, 6 Peter's Rep. 625. A court of Chancery may refer an account generally, or, on the return of the report, they may themselves determine any questions or all questions contested by the parties. *Field et. al. v. Holland*, 6 Cranch, 8. Before a Chancery cause is referred to an auditor, the principles should be settled, and appropriate instructions should accompany the reference. *Steel v. Taylor*, 4 Dana, 451. There is no necessity for an interlocutory decree to account, where the parties have made and agreed to a final settlement between themselves, unless there is a good ground laid to surcharge and falsify the account. *Culvert's ex'rs v. Markham et al.*, 3 Howard's Rep. 343. A general charge or error in the account is not sufficient, some particular error must be specified, as a ground to surcharge and falsify. *Ib.* Where an agent was appointed by the parties to settle the accounts, and the settlement, although not final, was sufficient to establish the complainant's right to the sum sued for. Held, that a final decree may be made without taking an account between the parties under an interlocutory order. *Ib.* Right of judgment creditor to account of fund conveyed by debtor, in trust to secure other creditors. *Skipwith v. Cunningham et al.*, 8 Leigh's Rep. 272. Where there has been fraud, the Court of Equity will open and examine accounts after any length of time, even though the person committing the fraud be dead. *Botisfeur v. Weyman et al.*, 1 McCord's Ch. Rep. 156. The court, however, is not, generally speaking, inclined to unravel an old account, notwithstanding it may have been settled upon an erroneous principle. *Ib.* But where an error is apparent on the face of the account, the court will always relieve. *Ib.* The court will not open a settled account where it has been signed, or a security taken on the footing of it, unless for fraud or errors distinctly specified and proved. *Ib.*

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tified in giving to the plaintiffs the liberty to surcharge and falsify.

Upon the whole, I am of opinion that this bill must be dismissed, and that it must be dismissed with costs.

Reg. Lib. A. 1829, fol. 170.

The error in an account must be specified. *Ib.* The court will not open an account of twenty years' standing, to give the party the benefit of a mere formal exception. *Gregory's ex'rs v. Forrester*, 1 McCord's Ch. Rep. 318, 332. Where a testatrix in her lifetime submitted accounts to arbitration, and was satisfied with the award and performed it, her representatives cannot open the settlement on account of usury in the accounts. *Ex'rs of Radcliffe v. Wightman*, 1 McCord's Ch. Rep. 408. A party seeking to open a settled account, in a proceeding before a surrogate for an account, should be able to show such a case as would have enabled him to file a bill in equity to surcharge and falsify such account. *Valentine v. Valentine*, 2 Barb. Ch. Rep. 430.

[*215] *BETWEEN MARY ANN BROUGH, *Plaintiff*; AND MARGARET ODDY, *Defendant*.

Indemnity.

WESTMINSTER HALL.—1829: 23d and 24th November.

The plaintiff having parted with title deeds, on which she had a lien, to enable her debtor to raise a sum of money on annuity, the defendant, by memorandum in writing, undertook to pay that annuity to the plaintiff, in case it should not be paid by the grantor.

The annuity fell into arrear, and the plaintiff paid it.

On a bill for specific performance and adequate security:

Held, that the plaintiff having taken this personal security, a court of equity would not interfere. Bill dismissed.

In the month of March, 1823, the plaintiff held certain title deeds, which had been deposited with her by John Brough, the elder, to whom the same belonged, under a verbal agreement that the plaintiff should hold the same as a security, to the intent that she might have an equitable lien for a debt of 900*l.* due to her from him, with lawful interest thereon; the whole of which

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debt, with some interest thereon, in the month of March, 1823, remained due to the plaintiff. In March, 1823, John Brough the younger, son of John Brough the elder, was desirous of raising a sum of money for his own use by the sale and grant of a life annuity, and the father agreed to join with his son in granting and giving security for the payment of such annuity. John Brough the younger, some days previously to the 7th March, 1823, on behalf and with the privity of John Brough the elder, requested the plaintiff to deliver up the deeds which had been deposited with her, for the purpose of enabling him and his father to raise such intended sum of money for the use of the son, by means of the grant of an annuity which he represented he and his father were desirous to secure by an assignment of the premises comprised in such title deeds, so that such assignment might take priority over the lien of the plaintiff on the premises. And in order to induce the plaintiff to part with the deeds, John Brough the younger proposed that

*the defendant should give an indemnity (as after men- [*216] tioned) to the plaintiff, against the consequence of any default being made in payment of such intended annuity, and the defendant consented to enter into an agreement with the plaintiff to indemnify and guarantee her to the extent of 30*l.* per annum, in the event of any default being made in payment of the annuity proposed to be charged on the premises comprised in the title deeds, in order to preserve the premises from being actually resorted to and taken by such annuitant under the trusts of the annuity deed; the terms and provisions of which agreement were contained and specified in a letter which Margaret Oddy wrote and sent to the plaintiff, which is as follows: (a)
 * Blackheath Hill, March the 7th, 1823, Madam: At the request of my son-in-law, Mr. John Brough, I beg to state that I am willing, in the event of his raising money by means of the security which you have lent to him, to become guarantee to you for the

(a) This letter not being stamped, could not be given in evidence. The agreement was stamped with an agreement stamp; but it was objected by the defendant's counsel, that it ought to have been stamped with a stamp applicable to annuities, and to have been enrolled: however, the case having been determined on the principal point, these objections were not noticed.

amount of 30*l.* per annum, during the continuance of that bond, it being understood that in the event of Mr. Brough becoming possessed of any property in right of his wife, that property to be appropriated to the discharge of the bond, and that I shall be from that time exonerated from further responsibility;" which letter was signed by Margaret Oddy.

John Brough the younger gave the plaintiff the following receipt for the deeds: "Received of Mrs. Mary Anne Brough the lease of all my property situated in Islington, which [*217] had been placed in her hands as *security, as also the counterpart of the lease of a house let to Mr. Cincliffe at 48*l.* 10*s.* per annum, for the purpose of assigning that sum in payment of an annuity which I hereby engage to return so soon as that purpose is accomplished. JOHN BROUGH.

The father and son were thereupon enabled to obtain, and did obtain, for the use of the son a sum of 500*l.*, upon the grant of an annuity of 40*l.* to one William Wilmshurst.

Pending the treaty with William Wilmshurst for the annuity, a memorandum of agreement in writing was prepared by John Brough the younger, and signed by Margaret Oddy, which is as follows:—"By these presents be it known, that under the following considerations and with the conditions hereinafter specified, I, the undersigned, Margaret Oddy of Blackheath, in the county of Kent, do hereby engage and make myself responsible to Mrs. Mary Anne Brough of No. 42 Lamb's Conduit street, London, for the yearly payment of the sum of 29*l.* 19*s.* 6*d.* of lawful money of Great Britain; whereas the said Mary Anne Brough hath yielded up to Mr. John Brough of High Wycombe, in the county of Bucks, for his use and benefit, certain securities, which were placed in her hands by Mr. John Brough the elder, of No. 8 Lancaster street, Burton Crescent, for securing to her the due payment of a certain sum; and whereas the said John Brough hath by means of those securities raised a sum of money for his benefit on annuity, for the due payment of which annuity those securities are made liable, I, the before mentioned Margaret Oddy, do hereby engage to pay the said Mary Anne Brough the

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sum of 29*l.* 19*s.* 6*d.* annually, by quarterly payments in the event that the before said John Brough doth not duly *pay the said annuity, and by cause of which non-pay- [*218] ment, those securities shall be taken for that purpose, it being understood that whereas the said John Brough is, by virtue of his marriage with my daughter, entitled under certain circumstances and conditions to become possessed of a sum of money, part of my present estate, that should he come into possession of such money, that from and after that time this bond shall be null and void. Blackheath, April 14th, 1823. MARGARET ODDY."

Default was several times made in payment of the annuity to William Wilmshurst, but the same was eventually paid by the two John Brougths, or one of them; default being made in payment of the quarterly portions of the annuity which became due on the 14th October, 1826, and 14th January, 1827, the plaintiff, in order to prevent a sale of the premises, with her own moneys paid to William Wilmshurst the two quarterly payments of the annuity in arrear, to the amount of 20*l.* This sum was afterwards repaid to the plaintiff by John Brough the younger; but default was made in payment of the three next quarterly payments of the annuity, and the plaintiff, in order to prevent a renewal of the threatened proceedings on the part of William Wilmshurst, paid the same to the amount of 30*l.*

The bill stated the preceding facts, and that John Brough the younger had taken the benefit of the insolvent debtors' act, and prayed a specific performance of the agreement, and a reimbursement of what the plaintiff had already paid on account of the annuity. And that the defendant might be decreed to give to the plaintiff some adequate security for her reimbursement or indemnity as the court should think fit.

*The defendant, by her answer, admitted the letter of [*219] the 7th March, 1823, but denied that such letter was ever meant to bear the construction which had been put upon it by the complainant, or that the defendant ever intended to guarantee any payments to be made by the complainant in respect

of the annuity, other than such as she might or should be legally compelled to pay. And that such guarantee was never intended by her to be extended to payments which the plaintiff might *voluntarily* make for or on behalf of the said John Brough the younger, and which she was under no legal necessity to make.

The defendant admitted signing the agreement, and submitted, that if she was liable upon such guarantee, the plaintiff's remedy was at law. And denied the plaintiff's right to have the specific performance prayed.

A witness deposed to the payment of three sums of 10*l.* each by the plaintiff on account of the annuity, and that the sum of 22*l.* 14*s.* remained due to the plaintiff.

Mr. *Pemberton* and Mr. *Girdlestone*, junr., for the plaintiff:—The plaintiff held certain deeds as a security for the sum of 900*l.* The younger Brough wanted to raise money, and he and his father concurred in applying to the plaintiff for the deeds; but she refused without some guarantee that she should be indemnified against the annuity about to be granted by the Broughs. And the defendant indemnified her by a guarantee in a letter, dated 7th March, 1823, written by the defendant to the plaintiff. The defendant is the mother-in-law of Mr. John Brough the younger. It is confessed in the answer that the plaintiff had given up the deeds, and it is for that act the guarantee [*220] was given. It is a necessary *inference from the agreement that a security should be given to the plaintiff, although the agreement is very inartificially expressed. *Parrot v. Wells and Wife*(*a*) and *Ranelagh v. Hayes*,(*b*)—these cases do not strictly apply, but they show how far the court has gone in cases of indemnity; the plaintiff was induced to give up the deeds in consequence of this guarantee.

Mr. *Pepys* and Mr. *Wright* for the defendants:—The plaintiff's remedy is in a court of law; does the court exercise its jurisdic-

(*a*) 2 Vern. 127.

(*b*) 1 Vern. 189.

tion simply on a contract to pay a sum of money? the court of equity never has exercised any such jurisdiction, and it is to be presumed never will; the contract is, that if the annuitant claims the annuity against the estate, then the defendant should pay, the plaintiff has no right to a further security.

Mr. Pemberton in reply :—The difficulty I have to contend with is, whether it is not a mere question at law. It is not necessary to show that the property has been seized in execution, the defendant being at liberty to make those payments which would protect her own property. And it is not disputed that payments have been made by her.

THE MASTER OF THE ROLLS :—The question here is, whether the court is under a necessity of sending the parties to a court of law. [His Honor here read the agreement.] It is said that the event has happened upon which the payment was to take place. For the purpose of considering the question, whether the court can entertain this case, we may suppose that the event has *happened. It is said that this is a case for equitable interposition, and that the court will compel the defendant to give a complete security. I am not aware that the court has gone any such length, if the parties choose to satisfy themselves with a personal obligation, the court will not give more; there is no engagement here to indemnify, but only to pay a certain sum. I am of opinion, that the plaintiff must be left to her remedy at law, that she has no case for equitable jurisdiction, and that the bill must be dismissed, and with costs.

BETWEEN HENRY GODFREY, D. D., PRESIDENT OR MASTER OF THE COLLEGE OF ST. MARGARET AND ST. BERNARD, COMMONLY CALLED QUEEN'S COLLEGE, IN THE UNIVERSITY OF CAMBRIDGE, AND THE FELLOWS OF THE SAME COLLEGE, *Plaintiffs*; AND THOMAS BRIDGE LITTELL, *Defendant*.

Boundaries.—Lessor and Lessee.

WESTMINSTER HALL.—1829: 17th November.

Where a plaintiff shows a title to some land and a confusion of boundaries, he is entitled to a commission or an issue. In this case a commission was directed.

QUEEN'S COLLEGE, at Cambridge, is seised in fee of the manor of Horsham Hall, in the county of Essex.

Certain fields called Lacy fields are parts of this manor, and the college was accustomed to demise them from time [*222] *to time for a term of twenty-one years, in consideration of a fine and yearly rent.

The defendant became the tenant of those fields in or about the year 1778, under a lease granted by the college, and given to the defendant by the Rev. William Collier, who was the executor of Sarah Bridge, an ancestor of the defendant, and the defendant continued tenant of the property under that lease, until Michaelmas, 1789, when the college granted him a further lease for twenty-one years, and he occupied the farm up to the time of the expiration of that term, in 1810. The quantity in the lease was described as three score acres, but the college contended that the real quantity was seventy-one acres and a half, whilst the defendant would only admit it to amount to forty-five acres, including the chaseway; and averred in his answer, that an acre, by estimation, of unenclosed lands in Cambridgeshire was only three roods; and from a circumstance stated by him, he concluded that the Lacy Fields were formerly unenclosed, and common or open field. The college also insisted, that two fields called the Oxleys, to the north of a chaseway, containing about twenty acres, were parts of the Lacy Fields, which, however, was positively denied by the defendant, who, in 1810, only gave up to the plaintiffs the

six fields lying to the south of the chaseway, containing forty-one acres. It appeared that, at the expiration of the last lease, the college claimed more land than was given up to the defendant, and brought an ejectment, which was afterwards abandoned.

The bill charged that, by reason of the fraudulent matters mentioned in the bill, the plaintiffs were deprived of any remedy at law in the premises, and that the college must be deprived of its just rights, unless this *court shall issue a [*223] commission to ascertain the boundaries of the lands belonging to the college and to the defendant respectively.

The bill prayed, that the defendant might answer and discover the matters of the bill, and that the farm called Lacy Fields and the boundaries thereof, might be distinguished and ascertained under the direction and decree of the court, and that for that purpose a commission might issue. The bill also prayed for an account of rents. On the part of the plaintiffs there was given in evidence an account of terrier, whereby Thomas Bridge, an ancestor of the defendant, after noticing that the farm called Lacy Fields did contain by estimation sixty acres or thereabouts, certified that the farm so estimated contained by admeasurement seventy-one acres and a half.

Several witnesses were examined on both sides, as to the reputation of the ownership of the land on the north side of the chaseway, some of them deposing that the whole of it was the defendant's own property, whilst others deposed to a reputation, that one of the closes, numbered 9 on the map produced, and two acres, part of a close numbered 8, belonged to the college.

On the part of the plaintiff, Francis Minot, aged seventy-seven, proved that he lived one year with the defendant's father, when thirteen years of age, and had since resided about two miles from the farm; that the Lacy Fields contained, as he had heard and believed, sixty acres, statute measure, and were situated in the parish of Hendycamps; that the chaseway passes through the Lacy Fields, twenty acres on the right side, and forty acres on

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the left side, and that the property or ownership thereof, [*224] was reputed to belong to Queen's College. His *grandfather, who was bailiff to the college, once told him, on going over Lacy Fields, that the fields on both sides the chaseway were what they call Lacy Fields, and that deponent believed it to be true.

John Unwin proved, that part of Lacy's Fields was in Hendycamps, and part in Steeple Bumstead, in Essex, and consisted of forty acres, as he had always heard and believed; and that the Lacy Fields lie altogether on the left hand of the chaseway; that the piece of land numbered 9, and two acres of No. 8, which No. 8 was formerly called Middle Oxleys (on the north of the chaseway) were the property of Queen's College; but deponent never knew they were considered part of Lacy Fields; that No. 9 contained about eleven acres, and that fifty years ago, there was no fence between No. 8 and No. 9; that the residue of No. 8, with a piece of land called Lower Oxleys, and other lands called the Haverhill belonged to the defendant; and he recollected some timber having been felled about sixty years ago on No. 9, by a person whom he understood to be the college woodward.

Thomas Darkin, aged fifty-nine, deposed that part of the Lacy Fields lay on the right hand side of the chaseway, and when he first knew the same it was in one piece of ploughed land called Short Lands, or Short Ten Acres, and contained ten acres or thereabouts. And this witness also deposed, that about twenty years since he was at work thereupon, when the defendant, in answer to a question put to him by the witness, said, that it did belong to Queen's College.

On the part of the defendant, several witnesses, some of them very old, deposed that the Lacy Fields all lay on the [*225] south side of the chaseway; and one of them *deposed, that Lacy Field belonged to the plaintiffs, and that he had heard Joshua Clayton, the woodward of the defendant's father, say that the Upper Oxleys was said to belong to the plaintiffs. Two of the defendant's witnesses, one of whom had

been tenant to defendant's father, and the other was the son of a tenant, also proved that timber had been cut by those tenants on the Oxleys by the permission of defendant: but the plaintiffs had cut timber on the Lacy Fields only. The respective sons of two other tenants of Lacy Fields and other lands also deposed, that the Lacy Fields lay on the south side of the chaseway, and contained about forty acres, and that the lands of the plaintiffs were always reputed in the neighborhood to lie entirely on the south side of the chaseway. It appeared that the defendant's father, in his lifetime, always let the Lacy Fields with various other lands, in one holding called the Nesterfield End Farm. A land surveyor proved a map he made for the plaintiffs about thirty-five years since of the parish of Hendychamps. He also proved that he was present at a meeting in 1811, which was attended by the bursar and two other officers of the college, for the purpose of finally settling the matters in dispute; and when the meeting broke up, he considered the matter to be settled in favor of the defendant. Some witnesses on the part of the defendant proved that an estimated acre of unenclosed land in Cambridgeshire was about one-fourth or one-fifth less than the statute measure, and this was confirmed by some of the plaintiffs' witnesses.

Mr. *Rose*, Mr. *Tinney* and Mr. *Loftus Lowndes*, for the plaintiffs:—The owner of this field, called Lacy Field, in the reign of Henry VIII, admitted that it was sixty acres, but there is only now given up to us forty acres: we *find the [*226] defendant in the possession of lands immediately abutting, and ancient witnesses have proved that Lacy Field lay as well on one side the chaseway as on the other. This family have been in possession ever since the reign of Henry VIII; and the plaintiffs have shown, by strong evidence, that some part of the lands on the north side does belong to the college, but there is no decisive evidence what part of the close No. 8, does belong to it; there is so much difficulty in determining what lands belong to the college, that the plaintiffs call for the assistance of this court.

Mr. *Bickersteth*, Mr. *Pemberton* and Mr. *Skirrow*, for the de-
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defendant:—The defendant left his holding in 1810, and this bill was not filed till 1825: in 1811, this very subject was discussed; and both parties having shown their respective papers, the matter was amicably settled between them; the officers of the college being satisfied, from the documents produced, that the college had no claim to lands on the north side. The bill charges a fraudulent retainer, but the plaintiffs have failed in any proof of this. Then the case comes to an accidental confusion of boundaries; we say that there has been no confusion of boundaries, for that this road, the chaseway, forms the boundary between the defendant's lands and the Lacy Fields belonging to the plaintiffs; but the whole color of the plaintiffs' case is, that in their ancient leases the field is described as being sixty acres, and they have produced evidence of terriers that the field was seventy-one acres; but they have not proved that the estimated measure was equal to sixty statute acres: an acre by estimation in the open fields of Cambridge consists of three statute roods, and this property fifty years since was an open field. Lacy Field [*227] lies *altogether on the south side of the ancient road; the lands on the north side are called Oxleys, and have been so from the most ancient times, as has been proved by the witnesses: the Oxleys are part of the manor of Horsham Hall, of which this college is the lord. About thirty-five years since a map was made of several properties in the parish, and in that Lacy Field stands as it is now found. The college did not object to it: the college might have brought an ejectment.

THE MASTER OF THE ROLLS:—This is the strong point of your case. How can I send a commission, when upon the plaintiffs' own evidence some of their witnesses swear to one thing, and others swear to another? That the plaintiffs are entitled to something, appears by the evidence of all their witnesses; I do not see anything in the way of an ejectment.

Mr. *Pemberton*.:—By a case in the second volume of Mr. Merivale's Reports, (a) a confusion of boundaries was held not to be sufficient ground for issuing a commission.

(a) *Speer v. Crawler*, 2 Mer. 418.

THE MASTER OF THE ROLLS:—The difficulty is the quantity, for I believe the commission always states the number of acres which the commissioners are to set out.

Mr. *Pemberton* contended, that the terrier might have referred to Lacy Field and other lands.

Mr. *Skirrow*:—It is submitted, that the plaintiffs have not proved the allegations in their bill, that the defendant has destroyed the fences, and not protected *them. The [*228] plaintiffs come with a very bad grace into this court after fifteen years. The origin of this bill is on the writ *nuper obiit*. It is impossible for the plaintiffs to sustain their bill.

THE MASTER OF THE ROLLS:—One of the witnesses swears that the plaintiffs are entitled to two acres, part of No. 8; another evidence is, that the plaintiffs are entitled to ten acres north of the way; now No. 9 is not that quantity, and there must be a confusion of boundaries in No. 8.

The court directed the case to stand over to another day, to produce precedents that issues had been directed in similar cases; and the plaintiffs' counsel were to be at liberty to produce precedents that it was customary to issue a commission without naming the number of acres.

ROLLS: *December 3d.*—Mr. *Skirrow*:—The plaintiffs allege that the defendant had removed the boundaries, and that therefore they were unable to proceed at law; but in order to obtain relief in this court they must prove themselves entitled to a certain quantity of land, which they have not done. The plaintiffs have examined seven witnesses; first, Francis Minot, who proved that his grandfather told him that the fields on both sides of the chaseway were what were called the Lacy Fields, but evidence of reputation cannot be given as to one particular fact; the evidence of the other six witnesses is to very little effect, and is contradictory: the plaintiffs ought to bring an ejectment. In

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the case of *The Bishop of Ely v. Kenrick*,^(a) the defendant not admitting the plaintiff's title, but denying it, the bill [*229] was dismissed; so again *in *Chapman v. Spencer*,^(b) it was decided that the plaintiff must first establish his right, before a commission could be granted, and if the right be not settled, the party will be left to his remedy at law. The defendant has proved, that in 1810 the matter was fully entered into, and proceedings in ejectment, which had been commenced, were withdrawn. It is in evidence that the then bursar was fully satisfied, and it is therefore submitted, that this is not a case for the aid of a court of equity. By all the witnesses examined on the part of the defendant, it has been proved that the Lacy Fields lie on the left hand side of the road only, and not the right; and if that be true the plaintiffs' case must fail. The plaintiffs on the record allege that they have a clear legal title; they have, therefore, a clear remedy at law. In all the cases in which the court has directed issues, it has been at the request of the defendant; whenever the court has directed an issue, it has been "whether ninety acres, or any other and what quantity of land belonged to the plaintiff." The plaintiff having first produced evidence in this court that he was entitled to ninety acres, the case of *Hilton v. Windsor*, decided on the 20th December, 1822, and not yet reported, is in point. It is submitted, upon authority and upon principle, that the plaintiffs may now bring their ejectment, and ought to have recourse to that remedy.

Mr. Rose and Mr. Tinney cited the cases of *The Duke of Leeds v. The Earl of Stafford*,^(c) *The Attorney-General v. Bower*,^(d) *Le thieullier v. Lord Castlemain*,^(e) *Metcalf v. Beckwith*,^(g) *Willis v. Parkington*.^(h)

[*230] *They also cited the following MS. cases, *Norris v. Le Neve*, 1742; *Attorney-General v. Bowyer*, 3d March, 1800; *Millard v. Panconst*, decided 7th August, 1794; *Robinson v. Hodg-*

(a) Bunb. 322. The bill was dismissed by three barons, *contra Comyns*, who was for directing an issue.

(b) 2 Eq. Ca. Abr. 163.

(c) 4 Ves. 180.

(d) 5 Ves. 309.

(e) 1 Dickena, 46.

(g) 2 P. W. 376.

(h) 2 Mer. 507.

son, decided 17th December, 1800; and *Clifton v. Gwynne*, decided 12th December, 1822. When the copyholder is tenant of the lord, he is bound to take care of the boundaries, and the landlord is entitled in this court to have that justice which he cannot have without it. In none of the cases cited was the question of quantity discussed, but it is submitted that those cases are a sufficient authority to show that a specific number of acres need not be set out.

Mr. Skirrow in reply:—In the cases cited, the plaintiff's title was admitted by the defendants; with respect to the case of *Lethicullier v. Lord Castlemain*,—it is also reported in the cases in the time of Lord King,—there the defendants admitted the legal title; here the defendant denies it: where the title is denied, the plaintiffs must prove a title to a specific quantity, and then the defendant may have a commission for partition. The cases are very well arranged in 1 Eden, 337, *Wake v. Conyers*.(a)

ROLLS: *December 7th*.—THE MASTER OF THE ROLLS:—This is a bill filed for the purpose of having a commission issued to ascertain the boundaries of certain lands, which the plaintiffs assert belong to Queen's College, Cambridge, but are in the possession of the defendant. It appears that the lands in question, which are called Lacy Fields, have been, from the time of Henry VIII, in lease to different persons under whom the defendant claims. These lands are known by the *description of [*231] Lacy Fields, and contain, by estimation, about sixty acres. The last lease expired some years since, and on that occasion the defendant delivered up to Queen's College forty statute acres only. The defendant insists that a computed acre consists of three roods only, and that the lands so delivered up corresponded with the description in the lease, which stated that it contained sixty estimated acres; but it may be observed, that if the defendant was right in stating that, by the custom of the county, a computed acre contained three roods only, still he ought to have

(a) 3 Ves. 113.

delivered up, according to that computation, forty-five instead of forty acres.

At the original hearing, I was of opinion that the plaintiffs had established a title to some lands in the possession of the defendant, and not delivered up at the expiration of the lease, but it appeared upon the evidence that it was uncertain whether there were twelve acres not delivered up, or whether there were twenty acres, or what other quantity there might be, of which the defendant retained the possession. There was nothing to inform me as to the quantity. I requested, therefore, that the case might stand over, and that the precedents might be searched, in order that it might be seen what course the court had been in the habit of taking, where it was convinced that there were some lands in the possession of the defendant, but the quantity was not established: and in consequence of that adjournment, many cases have been referred to, from the result of which it appears that, to establish a bill of this kind, it is, in the first place, essential that the plaintiff should make out a clear title to some lands in the possession of the defendant; otherwise this court will leave the plaintiff to

his remedy at law. It was argued that the court will [*232] not interfere unless the title of the plaintiff to some lands in the possession of the defendant be admitted by the defendant, and certain cases were cited, in which it appeared there had been an actual admission on the part of the defendant: but these cases do not prove that the court will not act unless there be an admission by the defendant; and undoubtedly, if a clear title be established by proof in the cause, it must be a sufficient inducement to the assistance of the court, as if it had been admitted by the defendant. It would be quite absurd to say that the court would not act upon a title established by proof, but will act only on a title established by admission; for if that were the rule of the court, there never would have been a decree in cases of this nature, for no defendant would ever be advised to admit the title of the plaintiff; the consequence of which would be that the remedy would be wholly defeated. Of necessity, therefore, a title established by proof must be equally operative with a title established by admission. The authorities ap-

pear also to require it to be established that there is some equitable ground for its interference. And this is clearly stated in the case before Lord Northington,^(a) and in the case of *Speer v. Crawler*, before Sir W. Grant. In this case there appears to be a clear equitable ground for the interference of the court, namely, a confusion of boundaries, which, it must be inferred, was occasioned by the act of the defendant, or those under whom he claims. The defendant insists that the land which was comprised in the lease was bounded by a certain way called the chaseway. The plaintiffs insist that there was land on both sides of the chaseway, and that the chaseway was not the boundary between the leased lands and the other property. Now it appears that a hedge has been made on the side of the chaseway, which appears to me not to be the boundary of the land of the plaintiffs; [*233] but that hedge has been made within the last fifty or sixty years, and there is no boundary to distinguish the land on the left of the chaseway from the property of the defendant. There is, therefore, as it seems to me, an equitable ground for the interference of this court. As this land has been in the possession of the defendant, and those under whom he claims, since the time of Henry VIII, this confusion of boundaries must be inferred to have been the act of the lessees; it cannot have been the act of the lessors, for they were not in possession.

Under these circumstances, therefore, the plaintiffs have established the two principles which are essential to the jurisdiction of the court, namely, a clear title to some land in the possession of the defendant, and an equitable ground for the interference of the court. Such being the case, the authorities fully justify me in stating that, although the evidence of the plaintiffs be not uniform as to the quantity of land which they assert to be in the possession of the defendant, the court will still decree a commission not only to set out the land, but to inquire into the quantity of that land. The court has discretion either to order a commission or to direct an issue, but in this case the justice due to the plaintiffs will be best answered by a commission; for if an issue were directed, that issue might not determine all

(a) *Wake v. Conyers*, 1 Eden, 331.

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points in litigation. The quantity might be ascertained, but the actual local situation of the land might still remain in doubt, and a commission, therefore, might become necessary. My opinion, therefore, is, that in this case a commission must be issued to inquire and ascertain what lands of the plaintiffs are in the possession of the defendant, with the usual directions as to the production of deeds and the examination of witnesses.

[*234] *The following is the substance of the decree which has been passed, but had not been entered when this went to press :—

Decree commission to inquire and ascertain what lands comprised in the indenture of lease bearing date the 25th of February, 1790, are now in the possession or occupation of the defendant, and to ascertain and set out the boundaries thereof; and in case the commissioners shall not be able to distinguish such lands, then they are to set out and allot other lands of equal value in the possession of the defendant in lieu thereof, or of such part as cannot be distinguished. Deeds and papers to be produced by the parties on oath. Commissioners to be at liberty to examine witnesses on oath, and take depositions in writing.

Further directions and costs reserved until after the return of the commissioners.

 NORRIS v. LE NEVE.

1742.—Reg. Lib. B. 1741, fol. 473.

Boundaries.—Freehold and Copyhold.—Commission to distinguish them.

The bill states that part of the premises claimed by the heirs were copyhold and belonged to them, and their title thereto was not controverted, but that the defendants insisted the copyhold lands were so intermixed with the freehold, and the boundaries so confounded, that they could not be distinguished by the plaintiff. Whereas the plaintiff insisted that the defendants could distinguish them, but, if necessary, prayed a commission. The defendants, by their answer, stated that the freeholds and copyholds were intermixed, and the boundaries destroyed and could not be distinguished by them, and that in case the plaintiff should be adjudged entitled to the freeholds, they (defendants) were willing a commission should issue. The court decreed that the plaintiff was entitled to the freehold, and that the same

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should be distinguished and set out from the copyholds belonging to the defendants; and that a commission should issue to distinguish the freeholds by metes and bounds.

 *MILLARD v. PANCONST.

[*235]

Allotments under an Enclosure.—Commission.

1794: 7th August.

By order of this date it was ordered that a commission should issue, to inquire and ascertain what freeholds belonged to the testator at his decease, situate in Walton and Wavendon Common, Berks, and what allotment in the enclosure of the common fields of Wavendon had been made or allotted to William Panconst, deceased, (testator's son,) in respect thereof. The defendants prayed they might be allowed to join in the commission, which was ordered.

Reg. Lib. 1793, B. 505.

 ROBINSON v. HODGSON.

17th December, 1800.—Reg. Lib. B. fol. 125.—*Master of the Rolls.*

Commission to ascertain Customary Lands.

By the decree on further directions, dated 6th February, 1797, it was referred to the master to inquire what part of the testator's estates were customary, to which the plaintiff became entitled as customary heir. The plaintiff afterwards died, having previously been examined on interrogatories before the master as to the customary premises claimed by him; and by his examination he claimed all, or the greatest part of the testator's estate remaining unsold, as customary. That it being apprehended a small part only was customary, but the testator's freehold and customary premises having been for a length of time in possession of the same tenant, it was, by order dated 4th August, 1800, ordered that in case the master should be of opinion he could not ascertain the customary estates without a commission directed to commissioners to view and set out the same, he should be at liberty to state the same to the court. The master, by his report, dated 16th December, 1800, certified that a commission was necessary; and on 17th December, 1800, it was ordered that a commission should issue to commissioners, authorizing them to view, ascertain, set out and distinguish by metes and bounds, such parts of the customary estate of the testator to which the plaintiff was entitled as customary heir.

 *ATTORNEY-GENERAL v. BOWYER.

[*236]

Boundaries.—Commission.

1800: 5th March.

By an order of this date, made upon the motion of the relator, it was ordered that a commission should issue directing commissioners to set out and distinguish the

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lands in the county of Suffolk claimed by defendant, Sir George Bowyer, from the lands in the same county which passed by the will of the testator, Sir George Downing, dated 20th December, 1817. And in case the commissioners should not be able to ascertain and set out the boundaries of the land claimed by the defendant, they were to be at liberty to set out and allot to him other lands of equal value.

Reg. Lib. A. 1789, fol. 408.

CLIFTON v. GWYNNE.

Boundaries of Manors.—Commission.

ROLLS.—1822: 12th December.

The defendant, who derived his title from a grant *temp.* Hen. VIII, claimed to be entitled to the whole of the waste lands in certain parishes, as belonging to certain manors of which he was lord. The plaintiff claimed to be entitled to a part of those waste lands, as pertaining to the manor of Welch Penkely, which had anciently been held with the defendant's manors, and the defendant himself had been steward under the crown of this manor; the plaintiff had become owner by purchase of the crown, but was unable to ascertain to what part of such waste lands his title as lord extended; and the defendant denied his right to any. By the decree of this date it was ordered that a commission should issue, to inquire whether the defendant, or any person claiming under him, was in possession of any lands of right belonging, or which did at the time the defendant became steward of the manor of right belong, to the manor of Welch Penkely; and that the commissioners should, as far as they were able, set forth and describe such lands, "if any such there be." And in that case set out and distinguish by metes and bounds such parts, if any, of the lands belonging to that manor in the possession of the defendant, or those claiming under him, lying intermixed with lands belonging to the defendant's manors; and set out so much of the respective lands so intermixed as to the commissioners should seem a fit and fair equivalent for the plaintiff's portion thereof.

Reg. Lib. A. 1822, fol. 2071.

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*KNIGHT AND ANOTHER v. MARTIN.

Costs.

ROLLS.—1829: 8th December.

The Master of the Rolls, in a suit by the assignees of a bankrupt, against a trustee of a fund contingent on the event of the bankrupt surviving his mother, which event happened after the bankruptcy, having made a decree in favor of the plaintiff, would not make the trustee pay costs, he having acted in ignorance.

A TESTATOR had bequeathed the sum of 2,000*l.* to his executor, upon trust to pay the interest to his sister for life, and after her

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death to divide the principal sum amongst the children of his sister, who should be living at the time of her decease, as they should respectively attain the age of twenty-one years. There were three children, and the sister having died in 1826, the executor paid to two of them their shares: the other became bankrupt in 1821. The plaintiffs are his assignees, and filed their bill against the executor, alleging that he had refused payment, and praying that the same, with interest, might be paid to the plaintiff. The defendant, by his answer, said he was willing to pay upon the joint receipt of the bankrupt and his assignees, and that he had been at all times willing to pay to the plaintiffs if he could do so with safety; but that the bankrupt, who had obtained his certificate, had given him notice not to pay over the same to the plaintiffs, and had claimed the same himself, and had threatened to institute proceedings against the defendant to make him personally liable for the said fund. Defendant submitted whether the bankrupt was not a necessary party, and to act as the court should direct. The defendant had examined a witness to prove letters to him from the bankrupt, claiming the property.

Mr. *Bickersteth* and Mr. *Booth* for the plaintiffs.

Mr. *Pemberton* for the defendant.

*The MASTER OF THE ROLLS made a decree for payment of the sum claimed, and he directed that the defendant should pay the costs; but on coming into court on the next day he sat, Friday, the 11th of December, 1829, his Honor, calling the attention of counsel to this case, said, that he thought he ought not to make the trustee pay costs, that trustee having acted in ignorance; but he could not give him his costs.

BENNETT v. LOW.

Costs.—Parties.

IN this case a bankrupt has been made a party defendant in a suit after his bankruptcy. He set up a claim on his answer to a

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life interest under the settlement on his marriage, yet it being manifest that he had no interest, all his estate having passed to the assignee under the commission against him, and who was before the court, the Master of the Rolls dismissed the bill as against the bankrupt with costs.

[*239] *BETWEEN HIS MAJESTY'S ATTORNEY-GENERAL, AT THE RELATION OF JOHN LANGHORN AND JOHN CLAY, INHABITANTS AND HOUSEHOLDERS OF THE PARISH AND BOROUGH OF BERWICK-UPON-TWEED, *Informants*; AND THE MAYOR, BAILIFFS AND BURGESSES OF THE BOROUGH OF BERWICK-UPON-TWEED, AND MARK JAMESON THEIR TOWN CLERK, *Defendants*.

Charity.—Poor Rates.—Costs.

ROLLS.—1829: 8th December.

The mayor, bailiffs and burgesses of Berwick-upon-Tweed, in consideration of 50*l.* left by will, for the erecting and maintaining of a house of correction there, by feoffment, dated 28th May, 1653, conveyed the moiety of a property there to the churchwardens and overseers, for the erecting and maintaining of a house of correction within the borough, and for maintaining and ordering the poor therein forever, and all other sturdy and idle persons coming and being therein, and for the getting them and every of them to work. By another feoffment of the same date, in consideration of 350*l.* owing by them to the poor, the mayor, &c., conveyed the other moiety, and some other lands, for the like purposes:

Held, that this town never having at this time raised poor rates, under the statute of Elizabeth, these were gifts in aid of the poor rates.

As to a part of the land, the rents of which had been duly applied down to the eighteenth century, when their application ceased for the use of the poor, and was wholly carried to the corporate chest. The court being satisfied upon the evidence it was intended to be comprised in the second feoffment, the court declared it to be a part of the charity, and that the rents should be accounted for from 1823, when the same were claimed for the use of the poor; and the rents thereof were also declared to be applicable in aid of the poor rates.

The costs of the relators to be taxed as between party and party, and paid by the mayor, bailiffs and burgesses. The extra costs of the relators to come out of the fund.

By an indenture of feoffment, dated the 28th day of May, 1658, between the mayor, bailiffs and burgesses of the borough

of Berwick-upon-Tweed, of the one part, and Andrew Crispe, alderman, of the other part, with livery of seisin indorsed, reciting that Sir Robert Jackson, knight, deceased, by his will bequeathed the sum of 50*l.* towards the erecting and maintaining of *a house of correction within the borough of [*240] Berwick-upon-Tweed. It was witnessed that in consideration thereof, they, the said mayor, bailiffs and burgesses, did grant, bargain, sell, alien, enfeoff and confirm unto the said Andrew Crispe, and his assigns, all that the moiety or full half part of that water corn milne, with the appurtenances, situate and being within the bounds, liberties and precincts of the borough of Berwick aforesaid, called Graingborne Milne, together with all grounds, lands arable and unarable, meadows, pastures, commons, hereditaments and appurtenances to the same belonging; to hold unto the said Andrew Crispe, and his assigns during his life, and after his decease, to such persons as Mr. Mayor and the general guild of the said town should think fit and appoint from time to time, to and for the erecting, upholding, maintaining, ordering, providing and disposing of a house of correction within the borough of Berwick aforesaid, and for the better maintaining, ordering, providing for, and disposing of the poor therein forever, and all other sturdy idle persons coming and being therein, and for the getting of them and every of them to work.

By an indenture of feoffment, bearing date the same 28th day of May, 1853, between the said mayor, bailiffs and burgesses, of the one part, and Robert Trumble and others, churchwardens, Thomas Dickinson and others, overseers of the poor within the borough of Berwick aforesaid, of the other part, with livery of seisin. It was witnessed that in consideration of the sum of 350*l.* by them owing to the poor of the parish of the borough of Berwick aforesaid, they, the said mayor, bailiffs and burgesses, did give, grant, bargain, sell, alien, enfeoff, and confirm unto the said Robert Trumble, and the other persons, parties of the other part, the other moiety or full half part of the said milne, *together with several pieces of ground situate within [*241]

the bounds, liberties and precincts of the said borough of Berwick, commonly called and known by the several names of the Clay Walls and Burrs, *alias* Aller Bush, to hold to the said Robert Trumble, Nicholas Lowe, &c., and their successors, to the same uses, intents and purposes, as are expressed in the said indenture of feoffment, of even date.

The information stated the preceding facts, and that during many years the rents and profits of all the premises comprised in the two indentures were received by or paid over to the churchwardens and overseers for the time being of the said parish and borough, and by them applied either wholly in and towards the maintenance and employment of poor persons in a house used as and for a work-house or house of correction, or partly for the above purposes, and partly for the use of the poor within the said borough.

That no further feoffment had been made.

That the rents had from time to time by the authority of the corporation been received by their treasurer. And as to the rents of Grainsburn Mill, and a close or parcel of land adjacent thereto, containing about twenty-five acres, the same had been, ever since the decease of the trustees in the indentures named, (except the interruption thereafter referred to,) either received by the treasurer of the corporation, and by him, by and under the authority of the corporation, paid over to the overseers for the time being of the said borough and parish, to be by them applied pursuant to the trusts, or, under the like authority, by the permission of the treasurer had been received by the overseers of the poor from the tenants, and applied as before [*242] mentioned. And *that in the years 1820 and 1821, the rents were under the like authority retained by the said treasurer for a very considerable time, although frequently applied for by or on the behalf of the then overseers of the poor. And on or about the 26th of September, 1823, at a guild or meeting of the said corporation, it was resolved that the treasurer should retain the same rents for the use of the corporation; and such rents were during six months retained, and the same were

afterwards paid over to the overseers, although it was alleged by the corporation that the rents ought to be employed in providing a house of correction for the keeping, correcting, and setting to work, rogues, vagabonds, sturdy beggars, and other idle and disorderly persons, within the intent of an act of Parliament passed in the seventh year of King James the First, entitled "An act for the due execution of divers laws and statutes heretofore made against rogues, vagabonds and sturdy beggars, and other lewd and idle persons."

That for a long series of years, and above 100 years last past, no part of the rents and profits of the said lands in the second indenture described as the several pieces of ground situate within the bounds and liberties of the borough of Berwick, called and known by the several names of the Clay Walls and Burrs, *alias* Aller Bush, or of any part of the said charity estate, except the said mill and the close held therewith, had been paid over to the said overseers, or applied to the purposes of the said charitable trusts, or for the use of the poor.

That the said mayor, bailiffs and burgesses, had in part fraudulently changed the names and altered the boundaries of the said lands, and confounded or endeavored to confound the same with other lands belonging to them in their corporate capacity; particularly *as to a close called the Burrs, which [*243] the bill stated to belong to the charity, and to have been comprehended in the second feoffment.

The information asked for a discovery as well against the corporation as against Mark Jameson, the town clerk, and prayed that it might be declared that the two indentures of the 28th of May, 1658, were effectual conveyances at law or equity of the lands and hereditaments therein comprised, and the fee-simple thereof, upon and for the charitable trusts and purposes thereby declared, and that the said charity might be established; and that the boundaries thereof might be ascertained; and if they were confounded, lands of a competent value belonging to the corporation might be set out; and for an account.

The defendants, by their answer, set forth the following order of guild, bearing date the second day of May, 1653: (*i. e.*) "Ordered that there shall be security given Mr. Crispe, to and for the use of the *poore* of this parish, by way of conveyance or rent-charge out of the Grainsburn Milne, for security for the 50*l.* promised by Sir Robert Jackson, towards the erecting a house within this boro'; the further consideration whereof is referred to the next general gill." Also, another memorandum or order of guild, bearing date the 13th day of May, 1653; "It is this day ordered that there shall be a conveyance made to Mr. Crisp, during his life in trust, for the erecting a house of correction within this borough, of the moiety of Grainsburne Milne, in consideration of 50*l.* left by Sir R. Jackson for that use, and now by him paid; and that there be another made to the churchwardens and overseers of the poor of the other moiety thereof for the same use." And the defendants further said, that they [*244] found the enrolments of the two **indentures* of feoffment in the enrolment book of the corporation, and they found in the record room the two indentures of feoffment cancelled, and that if those indentures were redeemable, they had been redeemed by moneys paid by the corporation for erecting and repairing the house of correction, and for the use and benefit of the poor. They admitted the order of the 14th November, 1821, to their treasurer, to retain the rents, but they set forth another order of guild, bearing date the 21st day of February, 1822, whereby it was ordered that the rents of the Graingburn Mill should be paid by the treasurer to the overseers, and the treasurer paid the same accordingly; but, by a subsequent order, the treasurer was directed to retain the rents, which he did for five months, when he was again ordered to pay the rents to the churchwardens and overseers.

By an order of guild, 2d May, 1653, the security (as it is called) to be given to Mr. Crispe, for Sir Robert Jackson's 50*l.*, is stated to be "to and for the use of the poor of this parish."

By the orders of guild, 28th January, 1656, the repair of Graingburn Miln is said "to concern the poor, it being for their use."

By an order of 19th May, 1676, A. Crispe is declared to be a feoffee "for the use of the poor." By an order, 10th February, 1676, the rent of the milne is said to belong to the poor.

In an order of 10th November, 1682, similar expressions are used; and by an order, 18th January, 1688, "the poor" are declared to be "in great straits, by reason of the non-payment of the rents of Graingburn Mill to the poor;" and, by an order of 17th November, 1721, "the *heirs of the [*245] trustees" are ordered "to attend the guild to be discoursed with as to the letting of the miln for the greatest advantage of the poor."

Documentary evidence, and the depositions of witnesses, were given in evidence, with respect to the identity of the Burrs, which will be seen to be fully noticed in the judgment.

Mr. *Tinney* and Mr. *Rolfé* for the relators.

Mr. *Bickersteth* and Mr. *Kindersley* for the defendants, the mayor, bailiffs and burgesses.

THE MASTER OF THE ROLLS:—This is an information filed by the Attorney-General, at the relation of certain inhabitants of the town of Berwick-upon-Tweed; the defendants are the corporation of that town. (His Honor then stated the prayer of the bill, and the two indentures of the 28th May, 1653.) The second conveyance is stated to be a conveyance made in consideration of 350*l.* due to the poor. Now it is extremely important, first, to know what is meant by the 350*l.* due to the poor. It appears, however, by entries, that at this time the town of Berwick-upon-Tweed had not taken the benefit of the statute of Elizabeth, and had not raised rates under that statute for the relief of the poor. The poor, therefore, could have acquired property only by the donations of benevolent persons, and it must be intended that this 350*l.* due to the poor, was a sum of 350*l.*, which, like the 50*l.* given to the use of the poor by Sir Robert Jackson, had arisen from the donations of certain benevolent persons. Now, the

second conveyance, like the first, would not create the legal fee; the churchwardens and overseers, not being a corporation, could not take the legal fee, because it was limited to them [*246] *and their successors forever; if they had been a corporation they would have taken the legal fee. So the other conveyance, which was a conveyance to Crispe for life, with remainder to such persons as the corporation should, from time to time, appoint forever, could not confer the legal fee. A legal fee cannot be created in individuals without the use of the word "*heirs*," or some expression which is equivalent to the effect of the term "*heirs*." With respect to charitable trusts, the court does not adhere to form; the court always looks at the intention, and the intention here was plainly to constitute a charity which was to endure forever. It appears by one memorandum only in the guild books, that it is stated that these conveyances were a security to the poor; and it has been said at the bar, that the security to the poor must mean a redeemable security, and, therefore, that the corporation might resume these lands at any time by showing that the consideration, in respect of which the conveyances were made by way of security, had been satisfied to the use of the poor. Now I do not apprehend that security to the poor has at all the meaning which is contended for here, because it was, in truth, a security to the poor if it were meant to be a perpetual conveyance, for it secured to the poor the revenues of those lands, in the place of leaving the moneys given to the use of the poor in the coffers of the corporation, which might be dissipated and lost; and, in that sense, it appears to me the term "security" is used in that memorandum. I am of opinion, therefore, that this court must decree that the trusts of these two conveyances are to be established as trusts for charitable purposes. The next question is, as to what charitable purposes are those trusts to be established. Generally speaking, gifts for the use of the poor are not gifts in aid of the poor rates; because it has been said, in other cases, that gifts in aid of the poor rates would be gifts [*247] *for the benefit of the rich and not for the poor; but in this particular case, this town not having taken the benefit of the statute of Elizabeth, and never at this time having raised poor rates, these were gifts for purposes in respect of which

poor rates were to be levied under that statute; these gifts, therefore, were a substitution for poor rates; poor rates having been adopted in that town in the year 1729, the declaration of the court must be, that these were gifts in aid of the poor rates. It appears so far from the corporation considering these conveyances merely to amount to redeemable securities, that they have continued to apply the revenues of the lands, which they insisted were comprised alone in these two conveyances in aid of the poor rates, down to the present time. The lands, of which they have thus applied the revenues, consist of twenty-five acres; and the question is, whether those twenty-five acres are or are not the whole lands comprised in those two conveyances? For the corporation, it is said that those twenty-five acres comprise all the lands, and they reason thus: the lands comprised in the two conveyances are Graingburn Mill, with the lands belonging to it, Clay Wall Lands, and the lands called the Burrs, or Aller Bush. That it appears, by a certain entry in the guild books in the year 1620, that the Graingburn Mill was at that time erected by the corporation, and that there was then annexed to it three acres of land only; that it appears on the evidence that the Clay Wall Lands consisted of five acres only, making, together, with the three acres of land of the Graingburn Mill; eight acres; and the revenues of twenty-five acres having been constantly applied to the use of the charity, that it must be intended that the seventeen acres, to make up the twenty-five, were the lands described under the term Burrs, *alias* Aller Bush. Now this would be a most reasonable conjecture, provided there was no evidence in the cause; but *there is evidence on both sides, [*248] and the evidence on both sides must be opposed, in order to determine on which side the weight of evidence applies. [His Honor here went into a very elaborate and critical review of the evidence, in the course of which he showed instances of the application of the rent of the Burrs down nearly to the eighteenth century, when the application of any part of these rents of the Burrs ceased for the use of the poor, and was wholly carried to the corporate chest, and that when the corporation afterwards applied a part of the rent which they received for the Burr Lands to their own use, and for the benefit of the corporation

chest, it was to be considered as a gradual usurpation, which, at last, terminated in the application of the whole of those revenues to that purpose.] Under these circumstances, therefore, I must infer that the lands called the Burrs were not included in the twenty-five acres, but that between the year 1620, when the Graingburn Mill was erected, and the year 1653, when these conveyances were made, there had been, by the acts of the corporation, considerable additions made to the quantity of land which was originally annexed to the Graingburn Mill; and that the land called the Burrs, therefore, which is stated to be about nine or ten acres in quantity, and the description of which is perfectly known, and is now in the occupation of a person of the name of Laing, was land meant to be comprised in the second feoffment, in addition to the Clay Wall Lands. The amount of the consideration which is there stated to have been 350*l.*, was a sum at that time of very considerable value compared to the present nominal value of that sum.

Upon the whole, therefore, I must declare that the Graingburn Mill, with the twenty-five acre of land, together with [*249] the land called the Burrs, now let to Laing, *were by the indentures of the 28th of May, 1653, devoted forever to the erecting and upholding a house for the reception of the poor of the said town, and for the maintenance of the poor therein; and that the same, being purposes which were by law to be provided for out of the poor rates, the rents of the said mill and lands are applicable in aid of the poor rates, and are to be paid by the defendants to the churchwardens and overseers of the poor accordingly; and I must refer it to the master to take an account of the rents which have accrued due from the said lands called the Burrs since the year 1828, when the same was claimed for the use of the poor; and I must also refer it to the master to tax the costs of the relators up to the hearing, and direct that the same shall be paid by the defendants and reserve further directions and subsequent costs.

The costs to be taxed costs as against the defendants, and the relators to be paid their extra costs out of the funds.

 1829.—*Fereday v. Wightwick.*

The master to ascertain what lands occupied by Laing consist of the Burrs, and to apportion the rents.

There was a question as to the costs of the town clerk, who had been made a party to the bill for the purpose of discovery. Ordinarily the plaintiffs pays the costs of a bill of discovery; in this case the officer of the corporation was made a defendant for the purpose of discovery, and the court seemed to think that the corporation must pay his costs, and the Master of the Rolls directed that an inquiry should be made as to the practice, and whether, if the relators in this case are to pay the town clerk's costs, the corporation must repay them to the relators. The precedents were to be searched.

The question of costs has not yet been decided.

*FEREDAY AND OTHERS v. WIGHTWICK AND [250]
OTHERS.(a)

Mines.—Partnership.—Debts of a Bankrupt Partner to the Co-partnership.—Annuity for Years.

WESTMINSTER HALL.—1829: 19th November.

Mines, are, for many purposes, partnership property. They are liable to the debts of the partnership, and debts to the co-partnership; and notwithstanding the bankruptcy of a partner indebted to the co-partnership, the accounts are to be taken beyond the time of the bankruptcy, and up to the time of the sale; the debts of the partnership are first to be satisfied, and out of the bankrupt's share, repayment is to be made to the co-partnership of what is due to it from him.

Annuity for years originating in an agreement for a loan, and producing more than a return of the principal, and five per cent. interest, is usurious.

By indenture of lease, dated the 24th of June, 1799, George Birch, Esq., and Thomas Lane, clerk, granted and demised unto Thomas Smith, Samuel Fereday, William Turton, Charles Nor-

(a) 2 Jones & L. 391.

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ton, Thomas Jones and William Underhill, all the mines and strata of coal under certain messuages and lands at Tipton, in Staffordshire, for the term of 120 years, at the annual rent of 300*l.* an acre; and by an indenture of the same date, a lease was granted of the messuages and lands to the same lessees, except Underhill, for the like term of 120 years. By a deed, dated 5th August, 1800, the shares of each in the colliery were declared to consist in the whole of 200 shares, of which twenty-nine belonged to Underhill, and twenty-eight to Turton. By indenture bearing date the 19th May, 1802, in consideration of 6,500*l.*, Underhill assigned his twenty-nine shares to his co-partners, and the consideration money was paid out of the partnership fund. Various changes took place in the ownership of the shares, and Samuel Wagstaff became entitled to twenty-eight of them. Turton, who had the management of the partnership, became considerably indebted to it, and deposited with the plaintiffs some promissory notes as a part security. On the 2d March, 1822, a commission of bankrupt was issued against Turton, and on the 20th January, 1823, a commission was issued against Wagstaff. On the 4th

March, 1822, Turton being then a bankrupt, the other [*251] parties signed a *dissolution, which was advertised in the London Gazette. The bill stated the preceding facts, and that the co-partners had a lien upon the twenty-eight shares of Turton for the balance due from him to the co-partnership, and charged that on the 28th February, 1822, a notice was served upon the co-partnership that by a certain indenture bearing date the 18th day of January, 1813, William Turton assigned eight shares in the colliery and premises to Benjamin Higga, for securing 3,000*l.* and lawful interest. On the 2d March, 1822, a notice was served upon the co-partnership, that by an indenture bearing date the 26th February, 1814, Turton assigned to Thomas Devey Wightwick, a defendant, twenty shares as a security for certain sums of money. And the plaintiffs charged that such notices conveyed to them the first knowledge they had of the assignments therein respectively mentioned. And plaintiffs charged that those mortgages or securities were usurious and void. And, as evidence thereof, the plaintiffs charged, that by the indenture of the 26th February, 1814, William Turton, in

consideration of 4,000*l.* therein stated to be paid to him by Thomas Devey Wightwick, granted to him (Wightwick) an annuity of 731*l.* 8*s.*, payable half-yearly, for an absolute term of *eleven years and six months*, and he assigned the aforesaid twenty shares in the colliery as a security for such annuity. And the plaintiffs further charged that the same annuity paid half-yearly for eleven years and six months was more than sufficient to secure and pay at the end of that period the principal sum of 4,000*l.*, with interest for the same in the meantime, at the rate of 15*l.* for every 100*l.* thereof by the year, without any loss or risk whatever either of capital or interest. And the plaintiff further charged that such annuity paid half-yearly for *six years and six months*, was more than sufficient to secure or pay at the end of that period the principal sum of 4,000*l.*, with interest for the same at the rate of 5*l.* for every 100*l.* thereof by the *year. And the plaintiffs further charged that at the [*252] time when the defendant Wightwick advanced the 4,000*l.* to Turton, the real agreement between them was, that Turton should secure to Wightwick an annuity of 664*l.* 18*s.*, free from the property tax, for the term of eleven years and six months; and pursuant to such agreement, Turton, immediately before the execution of the alleged deed, made and signed twenty-three several promissory notes for 332*l.* 9*s.* each, being one moiety of the 664*l.* 18*s.*, payable, the one on the 26th day of August then next ensuing, and the others successively on the several days during the said period of eleven years and six months on which the several half-yearly payments of the annuity were to be made payable; and that Turton deposited the notes with Wightwick by way of further securing the alleged annuity. And it was agreed between them that on each of the half-yearly days of payment of the annuity, Turton should take up one of the notes in discharge of the then accruing half-yearly payment of the annuity. And the plaintiffs further charged, that it was at the same time agreed between Turton and Wightwick that a sum of 66*l.* 10*s.*, being one-tenth part of the 664*l.* 18*s.*, or thereabouts, should be added to the 664*l.* 18*s.*, and that the sum of 731*l.* 8*s.*, being the amount of the two sums added together, should be the amount of the alleged annuity so to be granted and secured.

Further charged, that the 66*l.* 10*s.*, was added to meet the property tax on the annuity. Further charged, that fourteen of the notes or bills had been duly taken up and paid by Turton previously to his bankruptcy, and that the remaining nine still remained in the possession, custody or power of Wightwick. Further charged, that at the respective times of the loans or advances by Turton to Higgs, it was agreed that Turton should pay to Higgs interest at the rate of 10 per cent., and that interest was paid at that rate. Further charged, that Higgs entered, [*253] and *had in his books of account, a debtor and creditor account between himself and Turton, in which he regularly took credit on the several quarterly days of payment from Ladyday 1809 to Midsummer 1815 inclusive, for one quarter's interest, after the rate of 10 per cent. Further charged, that no notice was ever given by Higgs to the company that the interest on the alleged mortgage debt, or any part thereof, was in any manner in arrear or unpaid. Further charged, that neither Wightwick nor Higgs gave notice to the firm that they desired to be considered as partners in respect of the assignments or otherwise, or that the firm was not to consider Turton as a partner; but, on the contrary, Wightwick and Higgs permitted and suffered Turton to appear and act, and the plaintiffs fully believed him to be the owner of the twenty-eight shares to all intents and purposes.

And the bill prayed that it might be declared that the co-partnership was dissolved on the 2d day of March, 1822, and that the said co-partnership might be declared to have a lien upon the twenty-eight shares of Turton for payment of what was due from him to the co-partnership.

Defendant Wightwick, by his answer, set forth his annuity deed, whereby, for 4,000*l.*, an annuity of 731*l.* 8*s.* was granted to him, and insisted upon its priority to any balance which should be found to be due from Turton to the co-partnership. He said, that the assignment to him was known to several of the co-partners, and denied that the notice of the 2d March, 1822, was the first notice that the co-partnership had of the assignment to him,

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and the defendant said that he had paid a valuable consideration for the annuity, to wit, 4,000*l*. This defendant further admitted, that Turton did, on the 26th February, 1814, make and sign three several promissory *notes for 332*l*. 9*s*. each ; [*254] and that the sum for which such notes were respectively signed, was one moiety of the said annuity of 664*l*. 18*s*. : admitted the payment of the annuity for seven years up to 26th February, 1821, but said that he never contracted to lend Turton 4,000*l*. or any other sum.

Defendant Higgs, by his answer, insisted upon the priority of the indenture of assignment of the 18th January, 1818, and claimed it in priority to any balance claimed by the co-partnership, and admitted, it was understood, that Turton should pay him 10*l*. for every 100*l*., by the year, and that this defendant regularly took credit in his books for interest at that rate. Amongst the depositions on the part of the plaintiffs was that of an accountant, that he had made a calculation of the value of an annuity of 731*l*. 8*s*., payable half-yearly, for the absolute term of eleven years and six months, and according to that calculation, he found that such an annuity so payable, would be sufficient to pay within that period, the sum of 4,000*l*., with interest thereon at the rate of 14 per cent. per annum, and that the like annuity of 731*l*. 8*s*., payable half-yearly, would be sufficient to pay in six years and six months, the sum of 4,000*l*., and interest at 5 per cent. per annum. And he also found, that an annuity of 664*l*. 18*s*., payable half-yearly for an absolute term of eleven years and six months without any deduction, would be sufficient to pay in that period the sum of 4,000*l*. and interest, at the rate of 12*l*. 10*s*. per cent. per annum. There were other depositions to the same effect, one of which stated, that the interest produced would be 12 per cent., and the time for repayment at 5 per cent., seven years and a quarter. There were also depositions of the debt due from Turton to the company. On the part of the defendant, Wightwick, there was the evidence of the bankrupt, that *three of the shareholders knew of the annuity [*255] granted to him. In the cross-examination he proved, that the real understanding between him and Wightwick, was,

that he should advance him 4,000*l.*, and that in some manner the same should be secured to him with interest exceeding 5 per cent. And he also proved the charges in the bill with respect to the notes.

Mr. Bickersteth and *Mr. Rolfe* for the plaintiffs.

Mr. Bickersteth.—It appears that in July, 1813, Higgs had made advances amounting to 3,000*l.* to Turton, upon an agreement that he should receive 10 per cent., and Higgs in answer admits this, and that he had credit for it in his account with Turton. Higgs took an assignment of eight of Turton's shares in the colliery in the shape of a mortgage, purporting to secure the sum of 3,000*l.* with lawful interest: yet after the execution of that deed, as well as before, he received 10 per cent. interest.

With regard to the case of Wightwick, he had, at different times, advanced 4,000*l.* to Turton; the transaction on the face of it is a purchase of an annuity of 731*l.* 18*s.*, payable for eleven years and six months for 4,000*l.* We find that in the course of eleven years and a half, he would have received back his principal with interest at 12 per cent.; in seven years and a quarter, he would have received his principal with interest at 5 per cent. Wightwick has actually received these payments for seven years; this is an usurious transaction, and a contrivance to get back the principal money with interest at 12 per cent. Now I am not prepared to say in all cases that a purchase of an annual sum would be usurious; but in this case there is no hazard. At

the time of the bankruptcy of Turton, he was indebted [*256] to the partnership in the sum of 10,000*l.* and upwards, and no person can take anything from Turton's interest until the partnership claim is satisfied: those who stand in the place of the partner, cannot be better situated than the partner himself, had he not become bankrupt. The affairs of a colliery have from the time of Lord Hardwicke, been considered as a trading partnership, *Crawshay v. Maule*:(a) as against the assignees

(a) 1 Swanst. 495.

of Turton, the other partners are entitled to a lien on his shares, for the purpose of satisfying the claims of the partnership upon his estate. I cannot dispute that those who represent Turton are entitled to a share of the subsequent profits of the co-partnership, the property of the bankrupt having been employed in it.(a)

Mr. Rolfe:—The question is, have the assignees of Turton, or the defendants, Higgs and Wightwick, any claim upon the mines, except as to what shall remain after the demands of the co-partnership are satisfied? In *Crawshay v. Maule*, Lord Eldon held that the leases constituted a part of the partnership effects. Now there were only in that case two individuals in the partnership, and if there could have been a case in which each partner might have disposed of his share that was the case; but Lord Eldon said that it had been repeatedly decided, that interests in lands purchased for the purpose of carrying on trade are no more than stock in trade, and, as a part of the stock, might be sold. In *Jefferys v. Smith*,(b) Lord Eldon, referring to a case before Lord Hardwicke, said that a colliery was *to be [*257] considered in the nature of a trade,(c) and where persons had different interests in it, it was to be regarded as a partnership; and where persons were concerned in such an interest in lands as a mining concern, the court would appoint a receiver although they were tenants in common of it. Now in the case before the court, the parties held under leases, and the part afterwards purchased was paid for out of the funds of the partnership. Now, do not the twenty-nine shares so purchased, form part of the partnership? The mine being worked under a common firm by the direction of a manager, and carrying every appearance of a partnership. The plaintiffs have a lien against the assignees, and against the persons claiming under the deeds of Turton. Neither Wightwick nor Higgs, can establish any claim under the deeds of Turton, which are usurious; for defendant Higgs, in

(a) *Crawshay v. Collins*, 15 Ves. 218; *Waters v. Taylor*, 15 Ves. 10; *Forman v. Homfrey*, 2 Ves. & Bea. 329; *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

(b) 1 Jac. & Walk. 298.

(c) *Story v. Ld. Windsor*, 2 Atk. 630; *Sayer v. Pierce*, 1 Ves. 232.

his answer, admits that the security was for the money at 10 per cent. If that be not usury, it would be impossible to say what is usury. With respect to Wightwick, it will be contended that an annuity for years certain does not constitute usury, but the authorities refer only to rent charges, and those, if not colorable, would be good, if they were not in reality interest of money. This is an annuity secured by an express covenant of the grantor, that half-yearly the party should receive a sum which in the end would exceed the principal and interest at 5 per cent. Could a man for 100*l.* grant an annuity of 110*l.* for one year? Could that be supported—or an annuity of the like sum for two years in consideration of 200*l.*? In the case of the defendant Higgs, there is a clear admission; and with respect to Wightwick, if there be not a case against him, certainly the laws against usury are not so strong as they have been thought to be.

[*258] *Mr. *Lovat*, for the executor of a deceased partner, and in the same interest with the plaintiff. In *Doe v. Gooch*,^(a) where the court having found that it was a usurious loan, refused to disturb the verdict on a motion for a new trial; upon which Justice Bayley said, the annuity is at hazard if for life; but where it is in the nature of an annuity for years, there is no case in which such an annuity has been held not to be usurious, where, upon calculation, it appeared that more than the principal, together with legal interest, was to be received.

Mr. *Tinney* for the assignees of *Turton*:—If Mr. *Turton*, at the time of his bankruptcy, had drawn out 10,000*l.*, I admit that in the account up to that time the partnership may take credit; but subsequent profits cannot be placed to that credit. There is an old case of *Story v. Lord Windsor*,^(b) wherein Lord Hardwicke said, a colliery is a kind of trade, and therefore an account might be taken of the profits in this court; but a debt of one partner upon another cannot affect his share. If the court should be of opinion that this was a co-partnership, the co-partners would only be entitled up to the time of the bankruptcy.

(a) 3 B. & A. 666.

(b) 2 Atk. 630.

(His Honor dissented from this, and was of opinion that the accounts must be taken up to the time of the sale.)

Mr. *Pemberton* and Mr. *Wilson* for the defendant *Wightwick*:—
The securities to *Wightwick* cannot be impeached at the instance of the present plaintiffs, unless they first establish that they have some interest in the shares of *Turton*. But they have shown no such interest. *Turton* and the rest of the owners of these mines were mere tenants in common. It was not a trading partnership, *nor can the doctrine of lien, which exists [*259] as between partners in a trade, be applied to an interest of this nature. It was a tenancy in common in lands and in taking the produce of them. That produce underwent no alteration, but was brought to market in the same condition in which it was obtained from the mines. In this respect the present case differs entirely from the case of *Crawshay v. Maule*, which is cited for the plaintiffs. The property there was iron-works, in the carrying on of which not only the iron ore obtained from the mines was made use of, but there was evidence that the partners, in the course of their trade, purchased large quantities of iron from other persons, and that the ore obtained from their own mines, and the iron thus purchased, were manufactured by them and taken to market, and sold in a manufactured state. That was clearly a trading partnership. Here, however, the subject is coals, which are merely taken from the mine and sold, without undergoing any change whatever. The parties merely took the natural produce of the land, and it does not differ from the ordinary case of tenants in common of lands, where one of the tenants in common has received more than his share of the rents and profits: in which case his companions have a personal remedy against him, but have no lien on his share. The evidence discloses another ground on which a court of equity ought to refuse relief to these plaintiffs. It appears that they were apprised of the treaty with *Wightwick*; that the negotiation with him was conducted by one of them; and that the money advanced by *Wightwick* was received by some of them in satisfaction of a debt previously owing to them by *Turton*.

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Supposing, however, the opinion of the court to be against the defendant Wightwick, on both these points, it is submitted [*260] that no case has established the proposition *that this transaction is usurious; but, on the contrary, there are many cases to show that it is not so. Usury is an offence created entirely by statute, and nothing can be usurious except what the statutes have expressly declared to be so. The present law on the subject of usury is the statute 12 Ann. c. 16, which provides, "that no person shall for loan of any moneys, wares, merchandise, or other commodities whatsoever, receive above the value of 5*l*. for the forbearance of 100*l*. for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts and assurances whatsoever made after the time aforesaid, for payment of any principal or money to be lent or covenanted to be performed upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of 5*l*. in the hundred as aforesaid, shall be utterly void "

It is obvious, therefore, that where there is no loan, or no forbearance, there can be no usury; and in conformity with this rule, it has been repeatedly decided that where the transaction is really for a sale of an annuity, though for a term certain, if there was neither a loan nor a communication for a loan, the grant is not usurious, though, in the event, the party may receive a larger sum than the legal rate of interest would have amounted to. And they referred to *Finch's Case*, (a) *Fuller's Case*, (b) *Burton's Case*, (c) *Rowe v. Bellasis*, (d) in which last case on the loan of 100*l*., it was agreed that for the forbearance the borrower should pay 120*l*. as follows; viz., 40*l*. on the 20th January and 20th July, by equal portions annually, next after July then instant, which exceeded the then legal interest of 6 [*261] per cent.; *and for further security a bond was given and judgment confessed for 200*l*. Twisden, J., held

(a) And. 121, pl. 169.

(b) 4 Leon. 208, pl. 334.

(c) 5 Co. 69.

(d) Sid. 182.

that the contract was not usurious, but was a purchase of an annuity for three years. They also referred to the opinion of Burnet, J., in *Lord Chesterfield v. Janssen*,^(a) and that of De Grey, C. J., in *Murray v. Harding*.^(b) The observation of Bayley, J., cited on the other side from *Doe v. Gooch*, was evidently made by that learned judge when his attention had not been called to the existing authorities on the subject, and cannot be considered as an expression of his opinion on the point.

THE MASTER OF THE ROLLS :—In the year 1709, a lease was taken of certain mines, and a lease was also taken of the surface; the mines and surface were used with a community of expense and profit. A mining concern is to some purposes a trading concern; it is not so to all purposes; it has not, therefore, all the incidents of a trading concern. It is a principle that all property, whether real or personal, is subject to a sale on a dissolution of the partnership. This is a property acquired by the partnership for the purposes of the concern, and it is subject to all the debts of the partnership property, and to the debts of one partner to the other partners in respect of the partnership.

Then as to the loans, are they or are they not usurious? The persons who advanced them have obtained the legal interest. The first person who claims is Higgs, who, at different times, advanced 3,000*l.*; and it was agreed that he should receive 10 per cent., and he actually did receive 10 per cent. up to the time of the execution of the mortgage security to him. Subsequently a mortgage is made to *him to secure that sum [*262] with interest at 5 per cent.; but it appears by the evidence that he continued to receive 10 per cent. It is impossible to raise a question upon it. This is clearly usurious. The other defendant's claim it has been endeavored to support by serious argument. He purchased an annuity of 66*l.* 10*s.*, and the property tax is added; this was purchased by him for a term of eleven years and a half, and there is a covenant in the deed to pay the same by half-yearly payments. The transaction was accompanied

(a) 2 Ves. 142.

(b) 2 Bl. Rep. 859; 3 Wils. 390, *S. C.*

Rochester, upon trust that he, the said Francis Barrow, his heirs, executors or administrators, should, from and after his decease, from time to time, permit and suffer his younger son, Thomas Edward Hulkes, the late father of the plaintiffs, to receive and take the rents and annual profits of all his said freehold and leasehold messuages, tenements, lands, grounds, hereditaments and premises, as and when the same should respectively accrue and become due and payable for and during the term of his natural life, for his own use and benefit, subject to the payment of the rents and performance of the covenants and agreements reserved and contained, or to be reserved and contained, in and by the present or future leases, whereby such leasehold premises were or should be held; and also all taxes, fines and expenses attending the same premises; and from and immediately [*265] *after the decease of his said son, T. E. Hulkes, subject as aforesaid, it was his will that the said Francis Barrow, his heirs, executors and administrators, should stand seised and possessed of the said freehold and leasehold messuages, tenements, hereditaments, estates and premises last thereinbefore mentioned to be thereby devised and bequeathed to him, upon trust for all and every the son and sons of his said son, Thomas Edward Hulkes, lawfully begotten or to be begotten, if more than one, as tenants in common, and not as joint tenants, and the heirs of their respective bodies lawfully issuing.

The testator died; and Thomas Edward Hulkes, having entered into business, had become indebted to D. H. Day & Co., his bankers, in the sum of 10,000*l.* and upwards, and by indenture bearing date the 7th day of December, 1820, he conveyed and assigned all his life interest in the said several estates and premises, by the will of the testator devised and bequeathed to him for life, respectively to David Hermitage Day, one of the firm of D. H. Day & Co., with power to receive the rents and profits of the said estates, and apply the same in the payment and discharge of the said alleged debt of 10,000*l.*, and interest, in manner therein mentioned, subject to the payment of the rent and the performance of the covenants; and it was agreed that D. H. Day might, by and out of the moneys which should come to his

hands, pay or discharge all sum and sums of money payable for rents, the expenses of performing the covenants in the leases under which the same were or might be held, the expenses of repairing, or for or on account of any taxes, charges, rates, *finer*, or other out-goings.

D. H. Day thereupon entered into possession, and received the rents.

*On the 9th day of May, 1821, a commission of bank- [*266] rupt was issued against Thomas Edward Hulkes, under which he was found and declared bankrupt. T. E. Hulkes died on the 30th day of January, 1824, leaving the infant plaintiffs, his only children, him surviving, who thereupon became entitled to the said freehold and leasehold premises.

The bill stated the preceding facts, and, after praying that the testator's will might be established, and the trusts thereof executed, prayed that the said D. H. Day might be decreed, out of the rents and profits of the said premises received by him, to pay and satisfy all fines and fees and expenses necessary for the renewal of any lease neglected to have been renewed during the time of his possession of the said premises, or his receipt of the rents and profits thereof, or such proportion of the said fines, fees and expenses, as, in the judgment of this honorable court, ought to be paid in respect of the life estate or interest of the said Thomas Edward Hulkes in the said premises.

A supplemental bill was afterwards filed, stating that an action had been commenced against the said David Hermitage Day by the assignees of the bankrupt, and that, by a verdict in favor of the assignees, the instrument under which D. H. Day received the rents and profits of the estates was found to be void, being taken by the defendant, Day, with the knowledge of T. E. Hulkes' insolvency, and that D. H. Day had alleged that he had paid over all the money he had received to the assignees.

This supplemental bill charged that D. H. Day had not acted

correctly, and was still answerable to the plaintiffs, inas-
[*267] much as he ought, from time to time, as *necessity re-
quired, to have renewed the leases, and done the re-
pairs; and that the assignees could only have recovered from him
the surplus.

D. H. Day, by his answer, stated that he had paid over the
rents, amounting to 2,009*l.* 14*s.* 8*d.*, besides costs, to the assignees,
and that since the verdict he had received 50*l.* on account of the
rent.

Mr. Bickersteth and *Mr. Beames* for the plaintiffs.

The question for the consideration of the court is, whether the
plaintiffs, who, under the will of Thomas Hulkes, are, by the
death of their father, become entitled to this property, can call
on those who have received the rents, to pay the fines for the re-
newal of the leases. It is immaterial whether there be in the
leases any covenant by the lessors to renew the interests of the
lessees; it is sufficient that there has been a habit of renewal, and
the tenant for life and those claiming under him are not entitled
to anything until the payment of the fines. *Mr. Day*, having re-
ceived the rents, is liable, notwithstanding the action and verdict
against him, for the fines for renewal.

Mr. Pemberton for *D. H. Day*:—All the money has been re-
ceived from *Mr. Day* by the assignees of the tenant for life, ex-
cept about fifty pounds, which he has since received. The decree
against him will be to deliver up the deeds in his possession to
the plaintiffs, and to bring into court the sum of 50*l.*; the bill
should then be dismissed as against him.

Mr. Barber for the assignees, was instructed to resist the bill
altogether. Why are the plaintiffs to have a preference
[*268] for the sum of 2,009*l.* over the other creditors *of the
bankrupt? at most it is but a debt, and the plaintiffs can-
not have a specific lien on that sum.

1829.—Nicholas v. Nicholas.

The MASTER OF THE ROLLS was of opinion that after the action at law, Mr. Day was not answerable for the fines for renewal. Declare that defendant Day, pay the 50*l.* into court, and bring in the deeds; the bill to be then dismissed as against him. Declare that the rents received by the assignees from Day, are to be considered as received subsequent to the bankruptcy, and, as such, liable to the fines and expenses of renewal.

The assignees are liable to the amount received from the defendant Day, after deducting the expenses of recovering it beyond the taxed costs. The bankrupt's estate is entitled to costs, charges and expenses.

Inquire what now would be the fine to be paid to the lessors, the dean and chapter of Rochester, in order to place the plaintiffs in the same situation as they would have been if the lease had been renewed according to the habit of renewing of the dean and chapter.

Inquire what are the costs, charges and expenses of the assignees in recovering from the defendant Day the sum of 2,009*l.*, that being the fund liable to pay the fines for renewal.

Reg. Lib. A. 1829, fol. 417.

*ANN NICHOLAS, WIDOW, AND OTHERS, *Plaintiffs*; AND [*269]
EDWARD NICHOLAS AND T. F. LEWIS, *Defendants*.

Will.—Bequest of Personalty partly enumerated.—Debts.

ROLLS.—1829: December 2.

R. N., by his will, gave all his personal estate to R. F. and J. N., that is to say, (he then enumerates several particulars,) in trust for the following purposes: that the same be not liable, or resorted to for the payment of mortgages or bond debts, until the legacies, debts and charges thereafter mentioned should be satisfied; and as soon as that could be effected, the same was to be resorted to in relief of his real estate. The testator then gave several legacies to his wife and children;

 1929.—Nicholas v. Nicholas

and bequeathed the residue, after the respective charges thereby made thereon, to his eldest son.

Held, that the residue, as well as the enumerated articles, were subject to the charges in the will mentioned.

ROBERT NICHOLAS, Esq., by his will, bearing date the 20th May, 1818, devised all his real estate to Thomas Frankland Lewis, Esq., and his heirs, to the uses therein mentioned, and then declared his will to be as follows: "And my will and intention is, that all the said manors, messuages and tenements, farms, lands, tithes, hereditaments and premises, so devised as aforesaid to the said T. F. Lewis and his heirs, shall continue liable and charged, exclusively of my personal estate, with all the mortgages and bond debts which when I die shall be charged upon the same and unpaid, such debts having all accrued by my wish to create an improvable permanent fund for the provision of my present large family. And I further give and devise my personal estate to the said Roger Frankland and John Nicholas, and the survivor of them, and the executors, administrators and assigns of such survivor, that is to say, my leasehold house in which I reside in Wimpole street, my insurance of 5,000*l.*, payable by the Equitable Insurance Company. Also my insurance of 3,000*l.*, payable by the London Life Insurance Company; and my insurance of 2,000*l.*, payable by the Sun Fire Insurance

Company; my security in the turnpikes, (therein described;) my rents in arrear; my salary of office; all *and whatever moneys I may at such time have in the funds, and the interest thereof, and other moneys whatsoever, in trust for the following purposes, that is to say, I hereby will and declare, that it is my will and intention, that the same be not liable or resorted to for the payment of my mortgages or bond debts, or for my aforesaid annuities and legacies, until the legacies, debts and charges *hereinafter* mentioned shall be satisfied and paid; and when and as soon as that can be effected, it is my will and intention that the same shall and may be liable and resorted to for relief of my said real estates. And I therefore first will and direct that my simple contract debts be paid thereout, and then I give therefrom to my dear wife, Anne, if she survive me, the sum of 700*l.*, without interest, to be paid to her

within seven months after my decease." And he then gave the sum of 300*l.* to trustees, who were to pay the dividends thereof to his wife for her life, if she continued his widow; and in the events therein mentioned the 300*l.* was to be residuum of his personal estate. And the testator gave to his children other legacies, and an annuity to his wife's parents, and further declared his intention as follows: "And I give all the rest and residue of my goods, chattels, personal estate and effects whatsoever, which shall remain *after the respective charges hereby made thereon*, to my dear son, Edward Nicholas, or such other as shall be my eldest son at the time of my decease; or in case of the death of all my sons before me, to my then eldest daughter."

By a decree made in this cause on the 1st December, 1827, the master was directed to take the accounts of the personal estate; and, in doing so, to distinguish between such parts thereof as consisted of the particulars mentioned in the will, and such parts thereof as constituted the rest and residue of such personal estate and effects. The master found, and by his report certified, *that the rest and residue of the tes- [*271] tator's personal estate, consisting of particulars set forth in the third schedule thereto, received by Edward Nicholas, amounted to the sum of 349*l.* 8*s.* 7*d.*, and that there were some other particulars then outstanding.

This cause now coming on for further directions, the question was, whether the whole of the personal estate of the testator passed to R. Frankland and John Nicholas, and was by the will (after payment of the simple contract debts and legacies charged thereon) subject to the payment of the testator's bond and mortgage debts in exoneration of his real estates.

Mr. *Bickersteth* and Mr. *Tenant* for the plaintiffs, the widow and younger children, contended that the will was clear; that the testator by his first gift intended to comprise the whole of his personal estate, such words as "*scilicet*" are merely words of suggestion or amplification, and are not words of restriction or exception.

Mr. *Treslove* and Mr. *Roupell*, jun., for the defendants :—Why should there be this extensive specification if the testator meant the whole of his personal estate, which might have been described as his personal estate? Nothing but the enumerated articles can pass ;(a) at least, connecting the general clause with the special clause, there is certainly a doubt whether the whole personal estate passed by the first bequest. Where there is a clear intent to pass the whole, the court will enlarge the specified terms ;(b) but when such intent does not appear, the court will not do so. The case before the court does not come within that class of cases in which the court struggles to prevent in-
 [*272] testacy, for here the residue is *disposed of.(c) The intent of the testator was, that the personal estate generally should be exempted from the mortgage and bond debts which he charged upon the realty ; and that is not inconsistent with his carving out a portion of the personal estate.(d)

THE MASTER OF THE ROLLS :—The testator meant to subject his whole personal estate to the same trusts as he has declared with respect to his house in Wimpole street, and the other enumerated articles. He gives his personal estate to his executors, and proceeds to enumerate it. It so happened that he omitted some particulars. He directs what they are to do with the subject of the gift : to pay certain debts, legacies and charges, and concludes with a residuary gift, "I give all the rest and residue of my goods, chattels, personal estate and effects whatsoever, which shall remain after the respective charges hereby made thereon, to my son Edward Nicholas."(1)

(a) *Wild v. Holtzmeyer*, 5 Ves. 310.

(b) *Chalmers v. Storil*, 2 V. & B. 222.

(c) *Rawlings v. Jennings*, 15 Ves. 39.

(d) *Howard v. Lord Rous*, 18 Ves. 131.

(1) In a devise of personalty "to be equally divided between my son P., my daughters D., C. and E., and the heirs of my daughter P.;" held, that the latter take but one-fifth among them. *Ricks v. Williams*, 1 Dev. Eq. 3. A testator bequeathed a large estate in land and slaves to his son, and by a subsequent clause of the same will, gave one of the same slaves to his daughter ; held, that the legatees took the slaves by moieties. *Field v. Eaton*, 1 Dev. Eq. 283. Testator bequeaths three slaves and one thousand dollars to trustees ; and directs the profits of the

Now what had he affected with those charges? Why he had affected his whole personal estate. It is perfectly clear what the intention of the testator was.

slaves, and the interest of the money, to be applied to the maintenance and support of his daughter M. and her child, and on the death of his daughter, the slaves and money to be given to her child or children; the above advances to be made to his said daughter M., independently of any claim testator might have against her husband; held, the testator's daughter was entitled to the whole profits during her life, and the daughter's child had no right to demand a share of them for her support and maintenance. *Wallace v. Dold's ex'rs.*, 3 Leigh, 258. The testator devised the interest of some public stock to his daughter for life; and at her death, the interest of one-fourth of it to each of his grandchildren, and at their decease, the principal and interest, to be disposed of by them to their heirs, in such proportion as they, by their wills respectively, may direct: and in case of the death of his granddaughter, S. C., without issue, her part to his granddaughter, E. C. This was a devise of one-fourth of the principal of the stock, after the death of the testator's daughter, to S. C., in absolute property. *Wilkins v. Taylor*, 5 Call, 150. The testator devised to his wife the profits of all his estate, except such moneys as might be due to him, and one-half of the interest accruing thereon, with power to sell all of his estate. But in case she married, he left her "the profits aforesaid, or of the interest aforesaid, arising from the sales, as the law might allow her," with such of his furniture as she might think proper to take; his carriage and horses, and all his ready money on hand. The wife married without having renounced the will; held, she was thereupon entitled only to a third of the profits of the lands and slaves during her life, to the cash on hand at the testator's death, and a third of the furniture. *Dandridge v. Dorrington*, 5 Call, 351. A bequest of a female slave and her increase, ought to be construed to apply only to future offspring, if the expression be not enlarged by the context of the will, or other admissible evidence. But parol evidence of declarations of the testator cannot be received to explain the intention of the bequest. Evidence to prove the situation of the property may be admitted. *Puller v. Puller*, 3 Randolph, 83. A residuary devise which contains an enumeration of certain articles of personal property, and adds "all the estate not before devised, including my gig and saddle horse," is not a general residuary devise, but shall be construed to include only property of the same kind as the articles enumerated. *Minor's ex'rs. v. Dabney*, 3 Randolph, 191. Testator bequeathed a slave named N. "to his wife during her natural life or widowhood;" and in a subsequent clause of his will says: "I desire that the negro woman N. shall become the property of my daughters A. and B, at their mother's death, or at the time that my son T. arrives to sixteen years of age. If the widowhood of my wife should terminate before her natural life, N. shall remain in this place for the support of my children." The daughters are not entitled to N. until both events happen, to wit, the death of the widow, and the arrival of T. to the age of sixteen; and the court will construe the word "or" conjunctively, to effectuate the testator's intention. *Gibbons v. Dunn*, 3 Murphy, 548. Legacies and distributive shares are not affected by the act of limitations. *Smart et al. v. Waterhouse*, 10 Yerger, 94. After the assent of the executor the title vests in

Declare that the residue comprised in the third schedule to the report, is subject to the charges with the other personal estate enumerated.

the legatee, and the property is not liable in his hands to executions subsequently obtained against the executor. *M'Mullin's Administrator v. Brown*, 2 Hill, 459. By a bequest of "all my household goods and furniture, except my plate and watch," everything about the houses, that had been usually enjoyed therewith, will pass. *Carnaghy v. Executors of Martin*, 2 Munf. 234. A bequest of personal chattels, in these words: "I lend to my daughter P. S. four negroes during her natural life, and then to the heirs of her body," vests the absolute estate in the first taker. *Hinson v. Pickell*, 1 Hill, 37. The term "lend," in a bequest, will be considered synonymous with "give," unless it is manifest that the testator did not intend the legal estate to pass to the legatee. *Ib.* After a bequest to P. S. for life, a limitation over, to the heirs of her body, enlarges the life estate into an absolute one, unless the remainder can take effect. *Ib.* A legacy to one of the testator's next of kin, "which will include every part of my estate intended for him," will not bar his claim to a share of the residue undisposed of. *Ford v. Whadbee*, 1 Dev. & Batt. 16. A legacy may be charged on land by inference. The intent governs. *Hudler's Administrator v. Whiteman*, 2 Harr. Rep. 401. If debts or legacies are directed to be paid by the executor, and land is devised to him, the land is chargeable, if it appear that the payment of such debts or legacies was an object first to be accomplished, in preference to the devisee's interest in the land. *Ib.* A legacy to an unincorporated association, with a direction that it shall go to the treasurer thereof for the time being, is given to a person as capable of being identified as any other individual, and the trust upon which he is to take it is indicated with certainty. *Tucker v. Seamen's Society*, 7 Met. Rep. 189. A testator gave a legacy to "the Seamen's Aid Society in the city of Boston." Another society, denominated "the Seamen's Society," claimed the legacy, and offered evidence to prove that the testator had no knowledge of the existence of the society named in his will; that he knew of the existence of said other society, was deeply interested in its objects, had contributed to its funds, and had frequently expressed a determination to give it a legacy; that he directed the scrivener who wrote his will to insert the legacy as made to said society; that scrivener, not knowing the existence of said society, told the testator that the name of the society was "the Seamen's Aid Society;" and that the testator thereupon submitted to have that name inserted: Held, that this evidence was inadmissible, and that "the Seamen's Aid Society" was entitled to the legacy. *Ib.* In ascertaining the intention of the testator, when he has not charged his lands expressly with the payment of debts or legacies, we must be governed not only by the expressions of the will, but by the situation of the property disposed of and of the person taking it. *Van Winkle v. Van Houten*, 2 Green's Ch. Rep. 172. A general residuary clause, embracing real and personal estate, where nothing but pecuniary legacies are previously given, and where, of course, nothing else could be taken out of the real estate, so as to constitute a residue, is not to be taken as full evidence that the legacies are to be charged on the land; but it is some evidence. It is a circumstance which, taken in connection with others, may satisfy the mind of the testator's

By the decree it is declared that the general personal estate passed to Roger Frankland and John Nicholas, and ought to be applied in or towards payment of the bond and mortgage debts of the testator in exoneration of the real estate.

Reg. Lib. B. 1829, fol. 301.

intention. *Ib.* Residuary clauses are usually introduced to prevent an intestacy as to any part of the estate, and are construed accordingly. They generally follow specific devises and conclude the will. But when the whole of a large estate, excepting two or three pecuniary legacies, is embraced in the residuary clause, and nowhere else, it is fair to infer that something more was meant than a bare prevention of intestacy. *Ib.* Such instances are not frequent, and when they occur may justly be considered as affording some evidence of the mind of the testator. It may be small, but it should have its weight. *Ib.* The fact that the legacy is a provision for a child, one of the heirs, and not a legacy purely voluntary, as to a stranger or one having no claims of nature or kindred, is a circumstance going to show an intention to charge the legacy on the land. *Ib.* So, the fact that the residuary legatees and the executors are the same persons, though not full evidence of an intention to charge the land, is a circumstance going to show an intention to charge the legacy on the land. *Ib.* So, the fact that the residuary legatees and the executors are the same persons, though not full evidence of an intention to charge the land, is a circumstance entitled to consideration, in ascertaining the testator's intention. *Ib.* The fact that a part of the legacy is in consideration of land of the legatee appropriated by the testator to his own use, is of great importance in ascertaining the intention of the testator, and a strong circumstance in favor of charging the land. *Ib.* Will any of the foregoing circumstances, standing alone, ascertain the intention of the testator to charge the land, with sufficient certainty to found a decree? *Quere.* *Ib.*

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

*HARRISON v. HARRISON AND OTHERS, AND HIS [*273]
MAJESTY'S ATTORNEY-GENERAL.

*Devise and Bequest.—Charities.—Mortmain.—Mortgages.—Moneys.
arising from Sale of Lands.*

ROLLS.—1829: 3d December.

Testator directed the produce of his real and personal estate to be invested.

Part of the personalty consisted of mortgages and securities on real and leasehold estates.

Part consisted of a sum of money due on a covenant to sell a freehold house.

Testator gave various legacies to charities.

He also gave the residue to charities.

Held void as to the mortgages and money due on the sale of the freehold.

The charities to abate *pro rata* in respect of the legacies and residue.

A bequest to the widow of testator in lieu of dower does not preclude her from her claim on the personal estate as the widow of a freeman of London.

Bequest of a sum of 50*l* to each of the three children of A. Now A. had five children. Held, that each child was entitled to 50*l*.

HENRY HARRISON, by his will, after giving 1,000*l*. to his wife in lieu of dower, and several small legacies, and directing the produce of his real and personal estate to be invested, and the dividends or annual income thereof to be applied for the use and benefit of his wife and daughter, and the survivor of them, directed that the principal moneys should be applied in payment of the several legacies thereafter mentioned: they were lega-

cies to relations and other persons, and several legacies of 100*l.*, 200*l.*, and other sums, to eleven different charities; and after the death of his wife and daughter, the testator declared, that the trustees of his will should stand possessed of the residue [*274] of his personal *estate, in trust for the same eleven charities. This bill was filed by the next of kin of the testator's daughter, Mary Lydia Harrison, and prayed that the devise and bequest by the testator, to the treasurers of the several charities of his freehold and leasehold premises, and of the moneys to be produced or to arise by the sale thereof; and also of the moneys due to the testator at the time of his death on mortgage, secured by the deposit of title deeds, or otherwise connected with real estate, should be declared void by force of the statute, and that the testator should be declared to have died intestate with respect thereto; and that the usual accounts might be taken by the master.

At the original hearing, it was referred to the master, to take an account of the personal estate, and the master was to distinguish what part of the personal estate did not consist of leasehold property, or of money lent upon mortgage, or upon the deposit of title deeds, or was otherwise connected with real estate. And the master was also to state, what real and leasehold estates the testator died seised or possessed of, and what part of the testator's personal estate was, at the time of his death, outstanding upon mortgage, or upon the security of title deeds deposited with him, or otherwise connected with real estate.

The master found that the testator, at the time of his decease, was possessed of a freehold house, which he had demised for a term of seven years, and covenanted to convey at the expiration of the term, in fee, upon being paid 700*l.*; this term expired after the death of the testator, who, by his will, directed the sale to be completed; and the lessees were ready to pay the 700*l.* [*275] and complete the contract on their *part. The master also reported, that the testator was possessed of a leasehold house; that he was entitled to 3,000*l.*, secured by mortgage of freehold and leasehold premises; to a sum of 200*l.* on a prom-

issory note, accompanied by a deposit of a lease for a term of years; to a further sum of 700*l.* secured by a mortgage of copyhold premises; and divers other sums of money, secured on mortgage of freehold and leasehold property. The amount of all the sums arising from leasehold estates, and secured on mortgage and otherwise on real estate, was 6,829*l.*; and the amount of the other sums, not arising from leasehold estates or money secured on mortgage, was 6,041*l.*

The several pecuniary legacies were paid some time since.

The legacies, and funeral and testamentary expenses, (except the legacies to charities, and also the legacy to the widow, which had been satisfied by a transfer of stock,) amounted to 4,876*l.*; and, in fact, the pure personal estate, unconnected with realty, amounted to what was almost sufficient to cover the charitable as well as the other legacies.

The contract for the freehold house has since been carried into effect.

Mr. *Bickersteth* and Mr. *Jeremy*, for the plaintiffs, contended that the gift to charities of so much of the general estate as was connected with the realty would fail,^(a) and go to the next of kin. There were many cases on this subject.

*Mr. *Wray* for the Attorney-General:—The testator [*276] having contracted in his lifetime for the sale of the freehold, it became personal estate; and in the case of *Jemmett v. Virrill*, Lord Gifford held that it became personal estate.

This point then stood over to be argued on the Monday following.

December 5th.—This cause was again mentioned.

The MASTER OF THE ROLLS, after adverting to the words

(a) 9 G. II, c. 58.

of the will, proceeded thus: the mortgagee has the legal estate in the land, subject to redemption. If the mortgagor does not redeem, the mortgagee becomes the absolute owner; and, therefore, it is an interest in land within the meaning of the statute. Now where is the difference between a mortgagee and a vendor under a contract only, no money having been paid? Is the mortgagee possessed of the legal estate? So is the vendor. If the mortgage is not paid, the estate of the mortgagee becomes absolute. So if the vendee does not pay the purchase money, the vendor retains the absolute property of the land. This, therefore, is an interest charging the land; and though it does not come within the words of the statute, is plainly within its equity.

Another point in this case was this: the testator, by his will, gave his wife 1,000*l.* in lieu of dower.

The testator, as was found by the master's report, was a freeman of London; and it was urged that the legacy barred her customary rights to the personalty as the widow of a freeman.

[*277] *The court held that the widow was bound to elect between her dower and the 1,000*l.*, but that she was not by that bequest precluded from taking any part of the personal estate to which she was entitled as the widow.

Decree. The funeral and testamentary expenses, debts and legacies, (except the legacies to charities,) and the costs to be paid out of the pure personal estate and his personalty connected with real estate, *pro rata*.

So much of the charity legacies as is proportioned to the amount and value of the personal estate as consisted of mortgages, money lent upon the deposit of title deeds, leasehold and other interests in, or any charges or incumbrances affecting real estate, is void by virtue of the statute 9 G. II, c. 36.

So much of the charity legacies as is proportioned to the amount and value of the other parts of the personal estate, is good.

The gift of so much of the residue of the testator's personal estate as does not consist of mortgages, money lent upon the deposit of title deeds, leasehold and other interests in, or any charges or incumbrances affecting real estate, is good.

So much of the residue as consists of mortgages, &c., is undisposed of, and is divisible between Mary Harrison, the widow, and the next of kin of the testator living at the time of his death, and their representatives.

*The testator having been a freeman of the city of [*278] London, the widow is entitled to four-ninths, and the other five-ninths go to the administrator of the testator's daughter, his only next of kin.

The covenant in the lease did not convert the proceeds of the sale of the freehold house into pure personalty, so as to exempt it from the 9 G. II, c. 36, and the same is to be considered as part of the testator's property connected with the real estate.

The widow is entitled to 1,000*l.* bequeathed to her in bar of dower, and she is not, by the bequest thereof, precluded from taking any part of his personal estate to which she is entitled as such widow.

The testator having also given to the two sons and the daughter of Thomas Lovell 50*l.* each, and the master having reported that Thomas Lovell had in fact five children, viz., one son and four daughters, the court decreed that the five children were severally entitled to 50*l.* each.(a)

Reg. Lib. A. 1829, fol. 493.

(a) See *Tomblins v. Tomblins*, 3 Atk. 257, and 2 Ves. 564; *Garvey v. Hibbert*, 19 Ves. 125; *Stebbing v. Walkey*, 2 Bro. Ch. B. 85; 1 Cox, 250; *Scott v. Fenhoulet*, 2 Bro. C. C. 86, and *Sleech v. Thorndington*, 2 Ves. 560; and see note to *Parsons v. Parsons*, 1 Ves. jun. 267, 2d edit.

 1829.—Lord Dorchester v. The Earl of Effingham.

[*279] *LORD DORCHESTER AND OTHERS v. THE EARL OF EFFINGHAM AND OTHERS.

Executor's Liability.

ROLLS.—1829: 16th December.

Executors depositing moneys belonging to the estate, with the same persons as the testator entrusted with his moneys in his lifetime, although they are not bankers, are not liable for a loss sustained by their bankruptcy.

THIS was a suit for carrying into execution the will of the late Lord Dorchester, and the cause now coming on for further directions, the question was, Whether Mr. T. P. Courtenay, the surviving executor, should be personally charged with the loss of 1,577*l.* 14*s.* 2*d.* occasioned by the failure of Messrs. Goodall and Turner, or that the loss should fall upon the estate of the testator?

At the original hearing it was ordered, that the master should inquire, whether any, and what sum of money forming part of the several balances reported due from the defendants upon the several accounts in the master's report mentioned, or which should be reported due from them, or any of them, upon the accounts thereinbefore directed to be taken, or carried on, were at any time or times, and when, deposited by the defendants, Richard Earl of Effingham, Thomas Carleton and Thomas Peregrine Courtenay, or any of them, in the hands of any and what bankers or agents, or were received by such bankers or agents, and whether they at any time, and when, became bankrupts; and whether any and what sum or sums of money, forming part of such respective balances, remained in the hands of such bankers or agents at the time of their becoming bankrupts. And the master was to state any special circumstances.

The master, by his report, found that the several sums [*280] of money therein mentioned had been received *by Messrs. Goodall and Turner as the bankers of the executors, and that a balance of 1,577*l.* 14*s.* 2*d.* remained due from them at the time of their bankruptcy. And the master found

the following special circumstances: That the testator for several years preceding his death, employed Messrs. Goodall and Turner, of Garlick Hill, London, merchants, as his agents in London, they having succeeded to the business of Sir Brook Watson, who was an old and intimate friend of the testator. That they were empowered by the testator to receive the dividends upon his stock, and they accordingly received the same until his death, at which time there was a balance of 265*l.* 16*s.* 8*d.* in their hands; and that after the death of the testator, the defendants, the executors, continued to employ the said Messrs. Goodall and Turner as their bankers, attorneys, or agents, in like manner as they had been employed by the testator in his lifetime; and that all moneys which came to the hands of the defendants, the executors, were paid into the house of Messrs. Goodall and Turner, on the executorship account of the defendants. And he found that Messrs. Goodall and Turner were merchants trading principally to Canada, and not bankers generally; that a commission of bankrupt was issued against them in the month of June, 1817, by the description of William Goodall and John Turner, of Garlick Hill, in the city of London, merchants and co-partners, dealers and chapmen, upon which they were declared bankrupts; at which time there remained in their hands a balance of 1,577*l.* 14*s.* 2*d.* due to the said executors as thereinbefore mentioned.

The will of the testator did not contain any clause to indemnify the trustees against any loss which might happen to the trust property by being deposited with any banker or other person for safe custody.

**Mr. Tinney* and *Mr. Walker* for the plaintiffs. [*281]

Mr. Bickersteth for the executors.

Mr. Teed, for Lady Dorchester and another.

The MASTER OF THE ROLLS thought that no blame could be imputed to executors, who employed the same persons as the testator had placed confidence in. An executor was not charge-

able unless he acted from corrupt motives, or *crassa negligentia*. It was not the practice of the court for executors themselves to apply to pay moneys into court. The court does not act too rigidly towards executors, the office being a difficult one; if it did, no one would be found to act as executors.

His Honor decreed that the executors were not liable for the moneys lost by the failure of Messrs. Goodall & Turner.

Reg. Lib. B. 1829, fol. 633.

[*282] *BETWEEN SAMUEL LEES, *Plaintiff*; AND JOHN NUTTALL AND WILLIAM WALKER, *Defendants*.

Vendor and Purchaser.—Attorney and Client

WESTMINSTER HALL.—1829: November 24th.

An attorney having been employed to purchase an estate for his client, entered into a contract in his own name, and insisted upon holding it in his own right.

Decreed to convey to his client, the plaintiff.

THE plaintiff, (in right of his wife,) and her sister, as the next of kin of Henry Wallis, the younger, were entitled for the residue of two terms of 1,000 years each to certain lands within the parish of Long Eaton as a security for certain sums of money, and the plaintiff was in the possession or occupation of the mortgaged premises, or in receipt of the rents and profits thereof.

The bill, after stating these facts, set forth, that the defendant Nuttall was a solicitor, and had been employed by the plaintiff to purchase the equity of redemption from Mr. William Walker, the heir at law of the mortgagor; but that the defendant Nuttall purchased the estate on his own account. The agreement between Nuttall and Walker bears date the 29th day of March, 1824; and the bill prayed, that it might be declared that the defendant Nuttall was a trustee thereof for the plaintiff, and that he should convey the same to the plaintiff, on receiving from the plaintiff the purchase money.

1829.—Lees v. Nuttall.

R. Bonsell, who married a daughter of the plaintiff, Sarah, the wife of John Bonsell, and Elizabeth Lees, spinster, deposed that the defendant Nuttall was employed as the solicitor of the plaintiff from the year 1817, up to the month of March, 1824, and frequently *came to the plaintiff's house on professional business. That the plaintiff, in the presence of deponent, consulted the defendant Nuttall about the propriety of purchasing the equity of redemption or reversion of the estate and premises, and that Nuttall advised the plaintiff to become the purchaser, and that the plaintiff authorized Nuttall to effect the purchase on the best terms he could. [*283]

Mr. *Girling* proved a letter from Walker to the plaintiff, dated the 25th of March, 1824, offering to sell the property to him for 1,200*l.*, and that he delivered it to the plaintiff on the following day.(a)

Lees, the younger, deposed that he went to the defendant Walker, by the direction of the plaintiff, and told him he was come to purchase the estate, and to give him the money for it mentioned in his letter, that the defendant Walker, said very well, and so it was concluded; but that the defendant Walker refused to go over to ——— to sign a more formal agreement by reason of his being lame, when the deponent said, we will send a lawyer over. This witness further deposed, that on the 27th of March, 1824, he went to the office of the defendant Nuttall, by the direction of the plaintiff, and then told him that the plaintiff had bought the estate for 1,200*l.*; when Nuttall got up in a violent rage and began to swear, and said, "You have ruined yourself and your family, and I have been over there, what I have been building up you have been pulling down; why did not you come over to me at the first?" and afterwards Nuttall said, "You know I was buying *it for you."— [*284] (The rest of this witness' evidence, and the testimony of the other witnesses, are set forth in his Honor's judgment.)

(a) This letter was, from circumstances attending it, considered to be only a proposal, and the plaintiff's counsel then proceeded with the case on the ground of equitable fraud, and that Nuttall was a trustee for the plaintiff.

Mr. *Pepys* and Mr. *Kenyon Parker* for the plaintiff.

Mr. *Bickersteth* and Mr. *Thomas Parker* for the defendant Nuttall.

Mr. *Douglas* for the defendant Walker.

THE MASTER OF THE ROLLS:—Mr. Walker must have the bill dismissed against him with costs. Mr. Walker, it appears, has conveyed the fee of the estate, which carries with it the equity of redemption to Mr. Nuttall, consequently there is no purpose for which Walker could be brought before the court. In truth the plaintiff never had any equity against Walker, because the alleged agreement with Walker is not an agreement which, in a court of equity, would have bound Walker; at all events, therefore, Mr. Walker must be dismissed, and have his costs.

With respect to the other part of the case, however strenuously and ingeniously it may be argued, it is difficult to conceive a case more clear in point of fact than this is. Mr. Halls says, in the month of March, 1824, he was present at a conversation between Nuttall and the plaintiff; that the plaintiff then explained to Nuttall the motives which he had to desire to become the purchaser of this particular property; that Nuttall strongly recommended him to become the purchaser, and that the plaintiff gave him an authority to buy at such price as, in his discretion, he thought proper. The evidence of Mr. Halls in this respect, [*285] is confirmed by two members of the family; they do not name the particular day, but they state the conversation precisely to the same effect as Mr. Halls has stated it.

Mr. Halls goes on to state, that at another time Nuttall and he conversed together on the subject of the plaintiff's purchase; that it was observed by Nuttall, that the plaintiff had no money, and that he could not become the purchaser; and Mr. Halls then asked Nuttall, suppose I were to assist him with the money, could it be secured on the property? Now, Nuttall answered it could be secured by a mortgage of the property, and Nuttall pro-

ceeded to say, "I think in this case it would be wise that there should be a written authority given by the plaintiff to you and to me, (that is to Nuttall and Halls,) not only to buy the property, but to sell it again, so as to afford an immediate repayment of the money that you, Halls, as his friend, should advance towards the purchase." And, upon that occasion, Nuttall says, "I will show you what sort of an authority it should be," and he immediately writes a paper, which is produced in evidence, in which the plaintiff is made to request Mr. Nuttall, to prepare a power of attorney, to authorize him and Halls to purchase the property, and then to resell it, with a view to the payment of what should be advanced by the plaintiff's friends. Now it is impossible to say that there can be the least doubt on these facts, that Nuttall had consented to become the agent of the plaintiff for the purpose of this purchase. But suppose all this was out of the question, suppose we knew nothing of the transaction except what takes place after the agreement which is made in consequence of the intervention of Mr. Girling, a medical gentlemen, who attended both families; this agreement (and it is considered a parol agreement only) appears to have been made on the 24th of March. This *agreement being made, Mr. Halls and [*286] the plaintiff met on the 26th; they attend Mr. Nuttall, for the very purpose of having a regular written agreement prepared, in order to make it a binding contract. Now the very circumstance of their attending on Mr. Nuttall for this purpose, is a most strong corroboration of the fact, that Mr. Nuttall was considered by the plaintiff as his attorney for this purpose.

When they tell Mr. Nuttall that the plaintiff has engaged to pay 1,200*l.*, and agreed with him to prepare a written agreement, Mr. Nuttall says, "why you have thrown 2 or 300*l.* away; if Girling had not interfered, and this transaction had been left to me, I should have been able to have purchased this for 2 or 300*l.* less; you have in truth thrown away, therefore, this sum. Now my recommendation to you (and it is a recommendation in his character of attorney) is, that you should immediately go to Mr. Walker, and be off this agreement if you can." This is the recommendation that Mr. Nuttall gave.

Well, now, suppose there was nothing else in the case; here these parties apply to Mr. Nuttall as their solicitor with respect to this purchase, as their agent in this purchase, and he advises them, that they have given too much, and recommends it to them to endeavor to be off the bargain. They are not, however, at all disposed to follow this advice, they are content with the sum which is agreed to be given. Now, this is on the 26th; on the 27th, there is a conversation with Mr. Halls, and he repeats to Mr. Halls what he had said to Girling and the plaintiff's son, he tells him they have given this sum of money, and that he considers it was so much money thrown away. The 27th happened to be on Saturday; on the Monday, Mr. Nuttall goes to [*287] *Walker and enters into a written agreement with him to purchase this property, which he had told the plaintiff's son and Girling that he had given 2 or 300*l.* too much for; he agrees to purchase it for 1,100*l.*, giving himself, therefore, nearly 200*l.* more than he stated ought to be given, and as to which he advised them to decline the purchase because the price was excessive.

This circumstance alone would fix on Nuttall the character of agent in this transaction, and would make it impossible for him to hold this purchase to his own use. I am clearly of opinion, therefore, that Mr. Nuttall must be considered as a trustee for the plaintiff, and that upon payment of the purchase money by the plaintiff, he must be directed to convey the equity of redemption of this estate to the plaintiff, and all other parties must join in that conveyance. Mr. Walker is certainly not a necessary party to that conveyance, having already conveyed the fee of the estate, which carries with it the equity of redemption to the plaintiff Nuttall.

The plaintiff must pay Walker his costs of this suit; and Mr. Nuttall must pay to the plaintiff his costs, excepting the costs to be paid by the plaintiff to Walker.

Reg. Lib. B. 1829, fol. 513.

*BETWEEN EDWARD BEASTALL AND MARY ANNE, HIS [*288]
WIFE, AND JANE SWAIN, AN INFANT, BY THE SAID
EDWARD BEASTALL, HER NEXT FRIEND, *Plaintiffs*; AND JOHN
SWAIN, GEORGE BELL AND HANNAH, HIS WIFE, ANN SWAIN,
WIDOW, AND JOHN ROADHOUSE, AND ELIZABETH, HIS WIFE,
Defendants.

ROLLS.—1829; December 9th.

An old gentleman, who had several children and grandchildren, had made and executed two wills, and disputes having arisen in the family about them, some of the oldest members of it entered into an agreement amongst themselves for a division of his real and personal estate. This was to be taken the next day, to the testator, for his approbation, and he was to be desired to cancel both wills. In the course of the night the testator died.

The personal property was divided according to the agreement, and a deed of covenant was executed with respect to the appropriation of the real estate; which deed, the party whose rights under the last will would be much diminished by it, understood to be a deed for carrying the first agreement into execution; but, in fact, the two instruments differed in many particulars. Held, that the first agreement was only a recommendation to the testator, and could not be carried into effect in equity. Held, that the second agreement or deed differing from the first agreement, whilst it was understood to contain corresponding provisions, could not be carried into effect. No costs given, the defendant having secluded the testator from the other members of the family.

IN the month of October, 1815, William Swain, the grandfather of the plaintiffs, had living three children, viz., John Swain, Hannah, the wife of George Bell and Elizabeth Swain, afterwards the wife of William Wilford, and now the wife of John Roadhouse.

In the same month, William Swain had two grandchildren, the son and daughter of his son, William Swain, then deceased, viz., the plaintiffs Jane Swain and William Swain, now deceased.

In the same month, William Swain, the grandfather, had three grandchildren, the children of his daughter, Ann Healey, then also deceased, viz., George Healey and *Wil- [*289]
liam Healey and the plaintiff Mary Ann, now the wife
of George Beastall.

In the same month, W. Swain, the grandfather, duly made and published his last will and testament in writing, bearing date the 10th October, 1815, attested, as by law required, for passing real estates, and thereby gave and devised his estates at Gunby and Sewstern, unto Christopher Compton and George Bell, their heirs and assigns, in trust to sell the same, and by means thereof to secure 500*l.* for the benefit of the plaintiff Mary Ann Beastall; and as to the residue of the moneys so to arise therefrom, for the benefit of the plaintiff Jane Swain and William Swain, the grandson, and the survivor of them; but in the event of both of them (William Swain, the grandson, and the plaintiff Jane Swain) dying under the age of twenty-one years, then the plaintiff Mary Ann Beastall, and all his (the testator's) children who should be then living. And the testator then proceeded to dispose of his personal estate and effects, by giving legacies to John Swain, Hannah Bell, Theodosia Glen and Elizabeth Roadhouse. The testator afterwards made a codicil to his will dated the 22d May, 1816, and thereby gave other legacies.

In the month of July, 1817, William Swain, the grandfather, was about eighty years of age, and residing at Eaton, with his daughter Elizabeth. The testator, having removed to the house of John Swain, made another will in July, 1817, whereby he devised his real estates to Christopher Compton and George Bell, for 1,000 years, to raise 500*l.* for Mary Ann Beastall; and subject thereto he gave his estates to William Swain, the grandson, his heirs and assigns forever, when he should have attained his full age of twenty-one years; but, in case his said grand-
 [*290] son should die under that age, then he devised *his estates to John Swain, his heirs and assigns forever: he then gave several legacies, and the residue to John Swain.

This will having come to the knowledge of the other children, they threatened to dispute the same, and thereupon an agreement was entered into, bearing date the 12th March, 1818, between John Swain, of the one part, and Elizabeth Swain, (now E. Roadhouse, and a defendant in this suit,) and the defendants George Bell and Hannah, his wife, of the other part, reciting the

particulars of the testator's property, and that for the purpose of making a fair and just division of his property unto and amongst his family, and to prevent litigation in case of his death, it had been mutually agreed, and it was thereby witnessed, that the estates at Sewstern and Gunby should be conveyed in trust for the plaintiff Jane Swain and William Swain, the grandson, their heirs and assigns, subject to the payment of 500*l.* to Mary Ann Beastall, and an annuity to the testator's sister, with an executory limitation over to all the surviving children of the testator, in the event of their deaths under twenty-one, and subject to the life estate of the widow of William Swain, the son.

The agreement provided for the distribution of the other property of the testator, of which 825*l.* was to be paid to John Swain, 1,612*l.* to the plaintiff Elizabeth Roadhouse, and 1,312*l.* to George Bell, in right of his wife, and the residue was to be divided between those three.

The testator died the morning after this agreement was executed, and in April, 1818, John Swain proved the will of July 1817.

*The *personal* property of the testator was divided [*291] according to the agreement.

By an indenture bearing date the 17th August, 1818, between John Swain, of the first part, William Wilford and Elizabeth, his wife, then Elizabeth Roadhouse, of the second part, and George Bell and Hannah, his wife, of the third part, reciting the will bearing date the 29th of July, 1817, and that the testator died on the 13th day of March, 1818, without having altered or revoked his will, leaving John Swain, Elizabeth Wilford, wife of W. Wilford, then Elizabeth Swain, spinster, and Hannah Bell, his only children, and William Swain, Mary Ann Healy, and the plaintiff Jane Swain, his grandchildren, him surviving; and further reciting that the will conferred greater benefit on John Swain than was intended for him by a certain other will made by the testator, bearing date the 10th day of October, 1815,

1829.—Beastall v. Swain.

and that disputes had arisen, and were then depending between the parties, touching the will of the 29th day of July, 1817, and the validity thereof, so far as the same will purported to confer a greater benefit upon John Swain than the benefit intended him by the will of the 10th day of October, 1815, and that the parties thereto had agreed to compromise their disputes; and in regard to the said estates they had agreed that the same should be conveyed and assured so and in such manner that upon the happening of the contingency, and the event of William Swain, the grandson, dying before he attained twenty-one years, the messuage, land, tenements and hereditaments might thereupon be and become effectually vested in fee tail general in the testator's granddaughter, the plaintiff Jane Swain, with remainder in fee simple to John Swain, Elizabeth Wilford, Hannah Bell and

Mary Ann Healy, as tenants in common, subject never-
[*292] theless and without *prejudice to the payment of two several sums of 500*l.* and 200*l.* charged thereon by the will of the 29th of July, 1817. It was witnessed that, in consideration of the premises, John Swain, for himself, his heirs, executors and administrators, covenanted with George Bell, his executors and administrators, in trust for himself and all others whom the covenants thereafter contained, did, should or might concern, that he, John Swain, and his heirs, should at all times thereafter, upon every reasonable request, do and execute all acts and deeds for lawfully and satisfactorily conveying and assuring the said estates, pursuant to the agreement of compromise; and further, that John Swain and his heirs should, upon the happening of the contingency, and in the event of William Swain, the grandson of the testator, departing this life before attaining twenty-one, thenceforth in the meantime, and from time to time until such assurance should be made pursuant to the covenant in that behalf thereinbefore contained, stand and be seised of or entitled to the estates, in trust for the plaintiff Jane Swain, in fee tail general, with remainder to John Swain, Elizabeth Wilford, Hannah Bell and Mary Ann Healy, in fee simple, as tenants in common.

By a certain bond or writing obligatory under the hand and seal of John Swain, he bound himself unto George Bell, in the

penal sum of 3,000*l.*, with a condition that if John Swain, his heirs, executors, administrators or assigns, should perform and keep the covenants and agreements contained in the indenture or agreement of the 17th of August, 1818, then the bond or obligation to be void.

Christopher Compton, the co-trustee, is dead, and William Swain, the grandson, died in the year *1820, [*293] intestate, unmarried and without issue. John Swain brought ejectments on the demise of himself and George Bell, to obtain possession of the estates. The bill charged that George Bell had destroyed the bond, and executed a release thereof to John Swain, and prayed that the destruction or cancelling the bond, or the release or discharge thereof, might be declared a fraud against the plaintiffs, and a breach of trust by the defendant George Bell, and that such release or discharge might be delivered up to be cancelled, and that plaintiff Jane Swain, might be declared entitled to the benefit of the covenants and agreements contained in the indenture and bond, and to have the same specifically performed and carried into execution; and that the estates might be conveyed, and settled and assured, according to the covenants contained in the indenture, so far as the same was capable of being so conveyed; that is to say, to the plaintiff Jane Swain, in fee tail general, with remainder to John Swain, Elizabeth Roadhouse, Hannah Bell and the plaintiff Mary Ann Beastall, in fee, subject to the charge of 500*l.* in favor of the plaintiff Mary Ann Beastall; or if it should appear to the court that the covenants and agreements contained in the indenture and bond ought not to be specifically performed, then, that the agreement of the 12th March, 1818, might be decreed to be specifically performed by the parties thereto, and in particular by the defendant John Swain.

On the part of the plaintiffs, there was evidence that John Swain kept the testator in his house, and prevented any access to him by his children and grandchildren.

There was also evidence that the agreement was entered into

in consequence of disputes in the family, by way of family arrangement, and to avoid litigation. On the part of the [*294] *defendant there was evidence that John Swain, in executing the deed, understood that the effect of it was to carry the agreement into execution.

There was also evidence, that at the time of entering into the agreement, it was settled that it should be taken to the testator for his approbation, and that both wills should be cancelled by him, but that the testator died before the party entrusted with it could get to the residence of the testator.

Mr. *Bickersteth* and Mr. *Wakefield* for the plaintiffs.

Mr. *Pemberton* and Mr. *Barber* for some of the defendants.

Mr. *Richards* for the other defendants.

THE MASTER OF THE ROLLS:—It is extremely true, that the agreements, upon the face of them, appear to be family arrangements; and with respect to them, the court does not attend to points which it requires in other agreements. (His Honor here stated the wills and the facts.)

John Swain induces his father to remove to his house, and a will is then made, by which John is to have the whole estate, if William, his nephew, should die under twenty-one; and the whole personal estate. The will becoming known, created great discontent in the family. On the 12th March, 1818, an agreement is entered into, and by that agreement the interest of John is greatly diminished. It was the intention of the parties to communicate the agreement to the testator for his approbation; this was not carried into effect, the testator dying on the [*295] following *day. The first question is, if it were the intention of the parties to the agreement only to recommend the testator to make a new will to carry the agreement of the 12th March into effect. Jane Swain, too, was then an infant. It would be impossible to carry into execution the agreement of

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 1829.—*Baily v. Taylor.*

the 12th March; it was not an agreement to operate without the approbation of the testator. Then, as to the subsequent arrangement, that does not carry into execution the agreement of the 12th March; and it was the intention of John so to do, he having divided the personal property. It is impossible for the court to execute the deed, when it is in evidence that he intended to carry into execution the first agreement.

I must dismiss the bill; but, from the conduct of John, in confining the testator, I shall not give costs.

Reg. Lib. A. 1829, fol. 167.

BAILY v. TAYLOR.

Copyright.—Calculations.—Costs.

ROLLS.—1829: 9th December.

The court does not give an account of the sale of a pirated copy of a work, unless it grants an injunction.

That injunction is the ground of the account.

The injunction may be granted at the hearing.

The account is consequential.

The court will not grant an injunction after a considerable lapse of time; and where piracy is only of a small part of a work, and is itself a matter of calculation, the court was of opinion that to interfere would not be a fair exercise of its jurisdiction.

THE plaintiff is the author of a book entitled "Doctrine of Interest and Annuities," and of another book entitled "The Doctrine of Life Annuities and Assurances;" and he is also the author of a book entitled *"Tables for the Purchasing and Renewing of Leases for Terms of Years Certain, and for Lives, with Rules for Determining the Value of the Reversion of Estates after any such leases, and for the Solution of other useful Problems adapted to General Use;" each of which works contained various tables and calculations. The first work was published in 1808, the second in 1810, and the third in 1802; of the last work three editions had been published, of the latter only one.

 1829.—Baily v. Taylor.

In 1811, the defendant published a book, entitled "Tables for the Purchasing of Estates, Freehold, Copyhold, Leasehold, Annuities, &c. ; and for the Renewing of Leases held under Cathedral Churches, Colleges or other Corporate Bodies, for Terms of Years Certain and for Lives, together with several Useful and Interesting Tables connected with the Subject ; also five Tables of Compound Interest." Thirteen of the tables of the defendant's work had the appearance of being copied from the plaintiff's tables, but nine of them were traced to former works. The plaintiff called upon him, and desired him to discontinue the publication or expunge the tables ; but at length consented to the publication of the edition, provided a new preface were printed to it, containing the following words:—"It may be proper here to say that some of the tables originally appeared in the works of Mr. F. Baily, on Leases and on Annuities, from which they have been selected."

On the 19th December, 1811, the defendant sent the plaintiff a printed copy of the book, with the following letter :—

"Sir,—I do myself the honor to send, for your acceptance, a copy of Mr. Inwood's tables, with the new preface, containing [*297] the paragraph proposed by you respecting your works. This will be inserted in all the books which remain unsold by,

"Sir, your very humble servant,

"JOS. TAYLOR.

"59 Holborn, Sept. 19th, 1811."

The bill was filed on the 18th of August, 1824, and stated, that the consent given by the plaintiff was only to the first edition ; and the plaintiff charged, that since 1811, the defendant had printed a great number of copies of his work, containing the plaintiff's tables, and sold them as copies of the first edition ; and that the defendant had also published second and third editions ; and the bill prayed for an account and injunction.

The defendant, by his answer, stated that most of the tables in

the plaintiff's books were copied from old works, and that the computations of the other tables were so simple and easy, as to be little beyond a mere mechanical operation; and the defendant said, that the object of the plaintiff in making the application to him was, to obtain the gratification of the complimentary notice of his works in the preface, and not as acknowledging any right in the plaintiff to any part of the defendant's work, or that he had any ground or intended to complain thereof, either at law or in equity; and the defendant considered all questions between him and the plaintiff set at rest: and the defendant further said, that he never considered what then passed between him and the plaintiff confined to the first edition of the defendant's work, but that the same extended to further editions thereof; and the answer further pointed out the difference between his tables and those of the plaintiff.

*In 1824, the plaintiff applied to the Vice-Chancellor [*298] for an injunction, which was refused. On the part of the plaintiff there was the deposition of one witness, who proved that he was present at an interview with the parties in 1811, when the plaintiff remonstrated strongly against publishing the book, and threatened to take measures to put a stop to the sale thereof; and the defendant then acknowledged, that the tables pointed out were taken from the book of the plaintiff, but pleaded, that he had been put to a very great expense in publishing the book, and that it would be very hard to deprive him of the sale of it; and that the plaintiff, at the request of the defendant, consented that the sale of that edition (being the first edition) might continue, on condition that in all the future copies which the defendant should sell, he should introduce a new preface, in which an acknowledgment should be inserted, that the tables so printed had been copied from the works of the plaintiff, the plaintiff expressly limiting that privilege to the then first edition of the book or work.

This, however, as has been previously stated, was denied by the answer.

The evidence of the defendant went to prove, that the cal-

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ulation necessary for forming these tables would cost but a few pounds.

THE MASTER OF THE ROLLS:—Does not the jurisdiction of this court depend entirely upon the injunction? I should like to have this point argued. I have a recollection of cases that determine that the injunction is the ground of the account: it is the injunction that gives the account, the remedy is by [*299] an action at law; in aid of the action you may file a *bill of discovery. The account is merely consequential. I think, upon general principle without authority, it must be so.

(To stand over for argument on this point.)(a)

(a) The editor has been supplied with the following report of the judgment of the Vice-Chancellor on the motion for an injunction, but he cannot answer for its accuracy.

1824: *December 22d*.—THE VICE-CHANCELLOR:—The question here is whether this be a case for the extraordinary interposition of a court of equity; whether this plaintiff has made out a probability of injury so great and of so much importance as to entitle him to call for redress, and that it is fit that a court of equity should interfere; or whether he should be left to pursue his remedy at law? Now the facts of the case, independently of the license, are these: The plaintiff publishes three works of great bulk, one of the works being two octavo volumes, another one octavo, and a third likewise in an octavo volume; and he says there are thirteen tables published by the defendant, in a small work selected from these three great works, and which thirteen tables are in truth copies; the plaintiff then goes on to state that the thirteen tables so copied are the work of calculations published by him, and so I take the fact to be; but, in truth, every one of these thirteen tables, except four, were calculated before the plaintiff's work, and are existing in other works previously published; and, therefore, the defendant considers them as not a computation on the part of the plaintiff, upon which he is entitled to the protection of the court under the statute. I am not, however, of that opinion; for although there were previously similar calculations, yet if they were calculated by him, although calculated by another person before him, they are a work of computation as to which he is to be protected by the statute.

But although he be so entitled to protection under the statute, they are spread over the plaintiff's works through these four volumes, and occupy but a small portion of the little work of the defendant. Now, what is the nature of the injury the plaintiff complains of? Defendant says that, by calculating those tables, he has the same right with the plaintiff, and if the court were to interfere to prevent such a publication only for twenty-four hours, yet in that time the defendant might acquire the same right to these tables as any other person by such calculation. Under such

1829.—Baily v. Taylor.

*Mr. *Bickersteth* resumed the question, whether the [*300] court could direct an account, an injunction not having been granted, cited *Doddsey v. Kinnersley*.(a)

THE MASTER OF THE ROLLS:—As the court may grant an injunction on the hearing of the cause, I rather think the court may, on a case shown, grant an account.

*Mr. *Fonblanque*.—But the difference of this case is, [*301] that an injunction has already been entertained by the court, and refused.

THE MASTER OF THE ROLLS:—I am not of that opinion; but you will concur in the opinion I expressed the other day, that the injunction is the foundation of the account; and at the hearing you have a right to insist upon the injunction.

circumstances, I should doubt whether it is a case for a court of equity to interfere. If it stood upon that point alone as to these thirteen tables, as his title is merely a calculation made by himself, or which he and other persons in a few hours would be competent to make, and which might be made in twenty-four hours, so as to give the defendant a right to publish the work, I should doubt if I could, under such circumstances, interfere if the case were to rest there. But there are other grounds to induce the court not to grant the injunction. The work complained of was originally published in 1811. The plaintiff, considering that the publication of those thirteen tables was an injury to his work, makes a remonstrance to the defendant, and he agrees to write in the preface an acknowledgment that they were copied from the plaintiff's work. Now, undoubtedly, that amounted to a license. The plaintiff says that, although it were so stated, yet it was to be confined to the first edition only, and it was not stuck to in the original affidavit; but now, in an affidavit since filed, that statement is supported by his brother, Arthur Baily, who was present at the time. The defendant swears that he has no recollection of anything as to the first edition, but understood that the plaintiff was to allow him to continue the publication of this work, in consequence of that sentence in the preface being added to it. Now, what happens? It appears that the defendant continues to sell his first edition, which goes on to the year 1820, and then he publishes a second edition, which, by a rapid sale, sold in four years, and then there was a third edition. It is only at this late period that the plaintiff calls upon the court to interfere, when this has been in the market for about fifteen years. Now, that circumstance alone would prevent the court from interfering upon this occasion. Upon the whole, I think that the injunction sought for cannot be granted.

Injunction refused.

(a) Ambler, 403.

1829.—*Bally v. Taylor.*

Mr. Wakefield:—We admit the similitude, but not the piracy.

THE MASTER OF THE ROLLS:—The defendant has not, in his answer, denied that he copied the tables from the plaintiff's works.

Mr. West:—In *Wooller v. Whitaker*,^(a) the measure of damages was the number of books sold by the defendant. In this case it should be what our loss has been, and what benefit the defendant has gained by the piracy, not the costs of calculating the tables. *Mawman v. Tegg*,^(b) where Lord Eldon said, he who has made an improper use of that which did not belong to him, must suffer the consequence of so doing; if a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. He has only himself to blame.

Mr. Fonblanque:—Your Honor being of opinion that [*302] *the court can entertain the application now, I will consider it as for an injunction; for if the injunction be not obtained, the account cannot be granted. This suit was commenced in 1824, when the injunction was refused.

Your Honor then assumed that these were copies of the plaintiff's works; that it was impossible to say the tables were the plaintiff's permanently, for in twenty-four hours the tables might be calculated. Is there any intervening circumstance, anything now that was not then before the court? Rules are laid down by Sir Isaac Newton, De Moivre, and other persons, and upon their principles the calculation of our table was made. In the case of *Burfield v. Nicholson*,^(c) the Vice-Chancellor said: "Upon reference to the prior publications, it is proved to be indisputably

• (a) This case was decided on the 8th of December, 1817, and is cited in *Eden on Injunctions*, p. 281, under the name of *Whittingham v. Wooller*, and published from Mr. Merivale's manuscripts in 2 *Swanst.* 428.

(b) 2 *Russ.* 385.

(c) 2 *Sim. & Stew.* 7.

1829.—Baily v. Taylor.

true, that there is not one of these figures which had not been given to the world prior to the Architectural Dictionary, and the matter not being new, the author of the Architectural Dictionary could acquire no property in these figures except by a new arrangement, but there is clearly no novelty in his arrangement."

If, therefore, the figures furnished by Nicholson for the Practical Builder had, in fact, been copied from the Architectural Dictionary, this would have been no piracy, because the author of the Architectural Dictionary had no property in these figures; it was his for the moment, but any other person, making the same calculation as himself, would be equally entitled to it. From the cases I can cite to the court, I could show that it is the injunction that gives the foundation of the suit for an account; but this seems admitted, and I shall, therefore, not trouble the court.

*With respect to the damage: we could have been the [*303] owner of these tables for the sum of 10*l.*, and it is for the court to say, whether it will take cognizance of a subject of so trifling an amount. Then with respect to the delay: the plaintiff has lain by for thirteen years; he allowed us to publish a second edition without making any complaint, and it having been decided four years ago, that an injunction could not be granted, I submit that the court will not now give an account.

Mr. *Wakefield* also for the defendant:—The plaintiff, in 1811, complained only of tables taken from the first edition, nor did he, until 1824, file his bill in this court.

There has been an acquiescence for thirteen years. I prove four of the plaintiff's tables not to be original, and four of easy computation, and that the whole can be calculated for 7*l.* 18*s.* This is different from works of genius and science; the calculation here is merely mechanical, the calculation of a common sum of arithmetic, and can hardly be deemed a piracy of literary property.

1st. I submit, that it is beneath the court to entertain a suit for a property of so small a value.

2d. The tables might as easily have been copied from the old authors as from Baily.

I admit we have not traced the four tables, but still we have the license of 1811, and we have proved that our second and third editions were publicly announced; and I submit the court will not cut down the license to the first edition. With respect to an injunction, the editions are all sold, and there remains nothing now on which an injunction can be granted; there may [*304] have *been new calculations for subsequent editions of the work.

The plaintiff has never attempted to enforce his legal right. It was held by Lord Ellenborough, at *Nisi Prius*, in *Cary v. Kearsley*,^(a) that part of the work of one author found in another was not of itself piracy, or sufficient to support an action; a man might fairly adopt part of the work of another; he might so make use of another's labor for the promotion of science and the benefit of the public; but having done so, the question would be, was the matter so taken used fairly with that view, and without what his Lordship termed the *animus furandi*? If there was no part of the book that was a transcript of the other; if the subject of the book was that which was subject to every man's observation, such as the names of the places and their distances from each other, the places being the same, the distances being the same, if they were correct, one book must be a transcript of the other; but when in the defendant's book there were additional observations, (and in some part of the work his Lordship found corrections of misprinting,) while he should think himself bound to secure every man in the enjoyment of his copyright, manacles must not be put upon science. I submit the court ought not to grant the injunction.

Mr. *Bickersteth* in reply:—With respect to the tables that are not traced, it must be presumed that the plaintiff computed them; the calculations require the aid of intellect, and that of a very

(a) 4 Esp. 172; See also *Wilkins v. Aiken*, 17 Ves. 424, and *West v. Francis*, 5 B. & A. 737.

1829.—*Baily v. Taylor.*

high character. The defendant's witness, in forming a calculation of the expense, says, he lays out of consideration the skill in the selection of *tables; there is here a directing [*805] mind, and your Honor adjudged, in *Barfield v. Nicholson*, that a copyright may consist of an arrangement of old matter. The evidence in 1811 was, that the tables of the defendant were copied from some or one of the works of which the plaintiff was the author, and the defendant, in his preface, says, they had appeared in the work of Mr. F. Bailey; the evidence is express, that the license of the defendant to proceed, is only for the first edition. The plaintiff had no knowledge of the second edition. Where then is the acquiescence?

It has been said, that the tables are of such easy computation that any one can make them; but what says Dr. Price? "that to make them would be an endless labor." Whoever makes them is entitled to the benefit of them.

THE MASTER OF THE ROLLS:—The plaintiff's works are not mere tables, but consist of letterpress to a very considerable extent. The plaintiff complains of the defendant having copied eight tables from the first work, four from the second work, and one from the third. That the publication of these tables is a piracy, is out of doubt; but the question is, whether it is fit that a court of equity should interfere? I must consider the application for an injunction as made to me this day in December, 1829, and I am to consider, whether a work published in 1811, is to be prohibited by an injunction in 1829; the defendant's work was published in 1811. Is a court of equity to interfere after so many years have elapsed since the first publication? I am of opinion, that it would be contrary to principle were I to grant an injunction. The 300dth part of the work is pirated: is the court to enjoin the defendant from the publication of the whole of his work, because he has included *a small part of [*306] the plaintiff's work? that taken from the work of 1802, is a mere matter of calculation, and the calculation being made, the defendant would be entitled to publish it. Would it be a fair exercise of the jurisdiction of a court of equity to interfere in

1829.—White v. Smith.

such a case? I am of opinion that it would not. How could the master calculate the value of a piracy of the 300dth part of a work? A court of law could best judge, and a master would be a much less competent judge.

Upon all these grounds I am of opinion, that this is a case upon which I cannot grant an injunction, and not granting an injunction, the court cannot decree an account. This bill, therefore, must be dismissed, and dismissed with costs.

Reg. Lib. B. 1829, fol. 368.

WHITE v. SMITH.

Tithes.—Hedge Wood.

1829: December 11th.

Wood cut from hedges is tithable, although used on the farm.

THE only question in this case to be discussed, was, whether tithes were due for some wood cut from hedges used on the farm?

Mr. Tinney and Mr. Roteler for the plaintiff.

Mr. Pemberton for the defendant.

December 12th.—The MASTER OF THE ROLLS said, he should make a decree both for the wood used for firing and that for hop-poles, in consequence of a decision of the Court of [*307] Exchequer, which had been cited.(a) He could not *discover the principle on which it was made, these articles having been used for the purposes of the farm: he should not give costs. The case might be taken to the House of Lords, but he did not think the decision would be supported there.

On referring to the registrar's book, it appears that the decree

(a) *Willis v. Stone*, 1 Younge & Jervis, 262.

 1829.—*Stewart v. Nicholls*.

was drawn up for dismissing the bill as to certain agistment tithes, and for a general account of all other tithes, so that the point reported does not appear upon the records of the court.

Reg. Lib. B. 1829, fol. 284.

STEWART *v.* NICHOLLS AND OTHERS.—ORIGINAL BILL.

ROBERTS *v.* NICHOLLS AND OTHERS.—REVIVOR AND
SUPPLEMENT.

Mortgagor and Mortgagee.—Practice.

ROLLS.—1829: December 17th.

Twenty years are not in absolute bar to a mortgagee. It is merely a case of presumption, which may be rebutted. A supplemental bill cannot be filed to an original bill, in respect of which subpoenas have not been served.

PATRICK PHILLIPS, on his marriage, settled some freehold and leasehold property on himself for life, remainder to his wife for life, remainder to the children of the marriage, remainder to himself absolutely; and by deed bearing date the 25th day of January, 1790, he mortgaged the same, with other leaseholds, to the plaintiff in the original suit, subject to two former mortgages.

On the 6th May, 1794, a commission of bankrupt was issued against Phillips, and he was declared bankrupt.

*The original bill was filed on the 19th of January, [*308] 1811, but no subpoena was ever served upon the defendants. The bill prayed redemption against one of the previous mortgagees, who still remained undischarged, and foreclosure against the assignees of Phillips.

The bill of revivor and supplement was filed on the 9th March, 1825, by the executors of Stewart, the plaintiff in the former suit. It set forth a former suit by one Green, a prior mortgagee, commenced in Easter Term, 1796, in which the usual decree was made for taking the accounts, and for foreclosure; but before any further proceedings were had, the suit abated by the death of

1822.—*Stewart v. Nicholls.*

one of the plaintiffs therein in 1811. That suit was revived in 1814. A receiver had been appointed in 1808, who paid the balances of the rents and profits from time to time into court. Patrick Phillips went to America, and in 1824, the master reported that he was dead. A former mortgagee was, in that suit, paid off out of the funds in court.

The bill of revivor and supplement alleged, that a receiver having been appointed of the rents and profits of the mortgaged premises, and the balances having been from time to time paid into court in the cause of *Green v. Nicholls*, and the principal and interest due on the mortgages in that cause mentioned being unpaid, and James Stewart being then ignorant that the contingent reversionary interest had become vested in Patrick Phillips, as thereafter mentioned, by the decease of his wife and only child, James Stewart was unable to prosecute his cause with effect in his lifetime; and charged that under the circumstances aforesaid, and particularly of Patrick Phillips and his son residing [*309] in America, and *from the uncertainty concerning him and his affairs, that no presumption of satisfaction of the mortgage arose by lapse of time or otherwise.

The defendants, by their answer, insisted that the plaintiff's mortgage must be presumed to have been discharged, and that, from the length of time, without any acknowledgment.

Mr. *Tinney* and Mr. *Wray* for the plaintiff.

Mr. *Tinney* after stating the facts:—There is no Statute of Limitation applicable to mortgages, it is usual to limit twenty years as a time when the mortgage shall be presumed to be paid; but where the delay is accounted for, it is otherwise:—it was held in *Fladong v. Winter*; (a) and it was the principle of a case therein cited, of *Wynne v. Baring*, on which fifty years had elapsed, that taking this to be a case of presumption, it may be met by evidence to satisfy a jury that the debtor had not the opportunity or the means of paying.

(a) 19 Ves. jun. 196.

There are two prior mortgagees who were proceeding to recover their debts, and they did not effect their object until 1824, and that sufficiently accounts for the delay.

This cannot be resisted but upon presumption of satisfaction arising from delay; when it is considered, that there were two previous mortgages, and that the property was so heavily incumbered, the presumption is rebutted; the moment an adequate cause for not enforcing the demand is shown, there is an end of the *presumption of delay; the length of time [*310] that has elapsed is sufficiently answered. We find the plaintiff making inquiries, he puts his deeds into the hands of his solicitor, and when the reversion fell into hand, there arose a reasonable ground that the fund was one which would be available for his debt; he then commenced proceedings, and until it was discovered that there was an available fund, it would have been useless to attempt to enforce the debt; the presumption of payment is therefore repelled.

Mr. *Wray*.:—Notice was given of the claim in 1811, to the solicitor of the first mortgagee, and all that was reasonable was done; no conclusion of payment could be come to by this court or by a jury; and with respect to reversionary property, presumption of payment cannot be raised from *laches* until after it has fallen into hand.

Mr. *Pemberton* and Mr. *Ching* for the defendant.

Mr. *Pemberton*.:—The bill of 1811 was filed in 1811, but the subpoenas were not served; and the mere filing a bill without taking any proceedings upon it goes for nothing. A bill never can be revived to which there is no appearance, still less where no subpoenas have been served. The object of this bill is to give the plaintiff the benefit of the suit of 1811; no order to revive ever has, or ever can be obtained in that suit. Are the circumstances such as to rebut the presumption of payment after thirty-five years, from the execution of the mortgage? there is nothing in the evidence to rebut it: no proceedings are taken

till 1825, the mortgage was executed in 1790, this gentleman became bankrupt in 1794; in all cases where relief is sought in a court of equity, it must be within twenty years, [*311] *as was decided in the House of Lords in the case of *Cholmondeley v. Clinton*, and Lord Eldon held that although the plaintiff was not barred of his writ of entry, yet a court of equity will not give relief after twenty years. As against bygone rents, the mortgagee can have no remedy of any kind. *Ex parte Wilson*, (a) *Gresley v. Adderley*. (b) In *Thomas v. Bridgstock*, on petition before your Honor, it was held and confirmed on appeal, that the possession of a receiver was only the possession of the parties to the suit; the mortgagor might have redeemed the mortgages in the suit, and then he would have had the rents, and no other mortgagee could have any right to an account of the rents; and whatever right the plaintiff may have against the reversion, he can have no claim upon the accumulated funds. If the court is of opinion, that the plaintiff is not entitled to any relief against the rents, the supplemental bill must be dismissed, because it does not pray relief out of the reversion.

Mr. Ching :—There are two suits now before your Honor; the first suit was instituted in 1811, on which no proceedings were had, nor was any subpoena served until 1825. The principle of this court is to limit relief on a mortgage or bond to twenty years, unless the delay can be explained away, and the party must show that he has used due diligence to obtain payment. The commission of bankrupt against the mortgagor was issued in 1794; would not a vigilant mortgagee have then prosecuted his demand? the amended bill was filed in 1825, a period of more than thirty years afterwards. With regard to the bygone rents, to the funds accumulated in the cause of *Green v. Nicholls*, a receiver is appointed [*312] *for the security of the parties to the suit, and not for some bystander; that fund has since been applied to the payment of the first mortgage, and there is a fund of upwards of 5,000*l.* in court. The plaintiff

(a) 2 Ves. & B. 352.

(b) 1 Swans. 573.

prayed in the supplemental bill to revive the suit of 1811, but he never obtained an order to do so, nor could he obtain it.

Mr. *Tinney* in reply :—Our amended bill was demurred to; the demurrer was overruled; the defendants, by their answer, have answered the bill of 1811, as well as the amended bill.

THE MASTER OF THE ROLLS :—Can you file a supplemental bill, when you have not issued subpoenas on the original bill; should you not have amended the original bill?

In order to entitle yourself to a decree, you must state facts upon your bill; but here you only refer to an original bill, and you cannot file a supplemental bill, to a bill on which no subpoenas have issued.

I am of opinion, too, that I cannot presume this debt is satisfied, for the mortgage was made in 1790, and in 1794, the mortgagor became bankrupt, so that there was only four years in which the mortgage could have been paid by the mortgagor, but this court can give no relief if there has been an *adverse* possession for twenty years. Unless the court be satisfied that the rents were applicable to the payment of the mortgage, would not the possession of the receiver be *adverse*?

Mr. *Tinney* :—The possession cannot be *adverse* to a subsequent incumbrancer, so long as the fund is *held [*313] for the benefit of the first incumbrancer, so long as he remains unsatisfied; in the meantime the interest in possession of the subsequent incumbrancer does not begin.

The cause was then directed to stand over.

Thursday, December 17th.—Mr. *Pemberton* stated that his client was not disposed to contend this cause on the point of pleading; and after what the court had said, that there was not a presumption of payment, he would consent to the plaintiff having his 1,200*l.* out of the fund, on being paid the costs in this suit.

1829.—*Stewart v. Nicholls.*

THE MASTER OF THE ROLLS:—That is very candid; I am of opinion that there was no presumption of payment. Declare that presumption of payment does not arise in this case from delay in bringing forward the demand of the plaintiff. Let the sum of 1,200*l.* 3 per cent. consols be sold out of the funds in court in the cause of *Green v. Nicholls*, and let the costs as between solicitor and client be paid out of the 1,200*l.*, and the accumulations of the proportion of dividends thereof; and let the residue of the fund be transferred to the plaintiffs in full satisfaction of the principal and interest and costs due on their security; and let them at their own costs in all things, execute an assignment of their security to the defendants as assignees, and deliver up the title deeds in their hands; and such assignment to be settled by the master in case the parties differ.

Mr. *Tinney* said he had found a printed copy of the judgment in the House of Lords, in the case of *Cholmondeley and Clinton*, and there was nothing in it applicable to the case of mortgagor and mortgagee; Lord Eldon therein stated, that he did [*314] not mean that it should; *and Mr. *Tinney* added, that it was clear that twenty years was not an absolute presumption of payment.

THE MASTER OF THE ROLLS:—I should certainly never extend it to mortgagor and mortgagee myself.

The MASTER OF THE ROLLS asked Mr. *Tinney* what he had found on the point of pleading.

Mr. *Tinney* replied that he had only found that from which he hoped to have obtained liberty to amend.

Mr. *Wray* wished the court to understand that he had always seen the difficulty in the point of pleading.

Reg. Lib. B. 1829, fol. 209.

1829.—Hudson v. Twining.

SOUTHWELL v. WARD.

ROLLS.—1829: Wednesday, 2d December.
Power to appoint new trustees.

MR. KOE :—This is a suit for the appointment of new trustees. There is no power in the deed for the appointment of new trustees; but it is wished, in the new deed, to add such a power.

THE MASTER OF THE ROLLS :—That cannot be.

*HUDSON v. TWINING.

[*315]

1829: Wednesday, 2d December.
Parties.

IN this case a testator had, by his will, in 1752, given legacies to several persons, on their attaining twenty-one. One of them went to America when a boy, and had not since been heard of; if living, he must now be seventy-seven years of age. His legacy had been handed over many years since to the defendants, who had, by accumulations of interest, now made it amount to six-fold; and this bill was, by his personal representatives, for payment thereof to them.

THE MASTER OF THE ROLLS :—Take an inquiry, whether he attained the age of twenty-one, and whether he is living or dead, with liberty to report special circumstances.

Mr. *Roupell* here stated to the court, that an objection was taken in the answer, that the personal representatives of the original testator were not parties. The testator died seventy years since.

THE MASTER OF THE ROLLS thought that it was not necessary to make them parties.

[*316]

*NEATHWAY v. HAM.

Legacy.—Misnomer.—Evidence.

ROLLS.—1829: 9th December.

A legacy having been given to a legatee, in a name which she had for many years assumed, the court will direct an inquiry, who was the person meant.

The deposition of an admission of a residuary legatee and executrix is good evidence, it being against her own interest.

GEORGE BRIDGE, who died in 1822, by his will gave to Mary Bridge, whom he described as his cousin, daughter of the sum of 200*l.*, and appointed his wife residuary legatee and sole executrix; but the wife died in November, 1824, without having paid this legacy, and by her will gave to Mary Hillditch, if living, 100*l.* stock.

•

The facts were, that George Bridge and the legatees in his will were fellow servants; she had a natural child by him, and afterwards went by the name of Mary Bridge. Her proper name was Mary Hillditch.

A witness proved, that after the death of George Bridge, on reading his will to his widow, she said that the real name of the said legatee was Mary Hillditch, and that Mary Hillditch had formerly been a kitchen maid in the late Earl Dorchester's service; and that she (Ann Bridge) had known Mary Hillditch at that time, and was a fellow servant of hers and of George Bridge; and that George Bridge, previous to his marriage with Ann Bridge, had had a child by the said Mary Hillditch, and that she (Ann Bridge) was aware of the fact at the time of its taking place; that after that event Mary Hillditch had passed and been called by the name of Mary Bridge; and that her husband, George Bridge, had told her, after making his will, that he had left a legacy to Mary Hillditch by the name and description of Mary Bridge, his cousin, but had omitted to mention the name of the legatee's parents from motives of delicacy, and from a wish to avoid exposing himself to the gentleman who drew

*his will, and who was at the time agent to Lady Caroline Damer; and that she (Ann Bridge) had promised her husband, George Bridge, that she would see that the legacy was paid to Mary Bridge, otherwise Mary Hillditch. [*317]

The same witness further proved, that upon several subsequent occasions Ann Bridge mentioned to him the subject of the bequest to Mary Bridge, otherwise Mary Hillditch, and sometimes asked deponent whether she ought to pay it, as the legatee's name was not Bridge but Hillditch; upon which he uniformly told her that as she had promised her husband George Bridge, that she would see the legacy paid, she ought to pay it.

Several other witnesses deposed, that Mary Hillditch went by the name of Bridge, and was delivered of a female child, of which the testator was the father, but that her real name was Mary Hillditch.

Mr. Bickersteth:—George Bridge, by his will, gave Mary Bridge 200*l.*; he appointed his wife executrix; she died in 1824, and by her will gave Mary Hillditch 100*l.* The bill alleges that the two names represented the same person, she being a fellow servant of the testator in the service of Lord Dorchester, and having been pregnant by him. That this is the same person there is evidence before the court.

Ann Bridge, being the personal representative, her declaration was evidence.

Mr. Russell for the executor of the executrix:—This claim is brought forward after the death of the executrix, Mary Hillditch never having demanded it; *and now the [*318] legacy is claimed by an administrator of Mary Hillditch. The plaintiff must first show by evidence that at the date of the will there was no such person as the testator's cousin Mary Bridge.

THE MASTER OF THE ROLLS:—I will give you the common inquiry, who was the person meant by "Mary Bridge my cousin"

 1830.—*Nicholson v. Nicholson.*

in the will of George Bridge? But I think it is an idle inquiry. There can be no doubt on the evidence that she is the person called Mary Hilditch.

There must be a decree for payment of the 100*l.* given to Mary Hilditch by Ann Bridge.

The evidence in the cause may be read before the master.

Mr. *Russell* objected to the admission of Ann Bridge being read.

THE MASTER OF THE ROLLS:—It was an admission against her own interest. You may make what use of the objection you can before the master.

Reg. Lib. B. 1829, fol. 2015.

[*319]

*NICHOLSON *v.* NICHOLSON.

Copyholds and Customary Estates.

ROLLS.—1830: 27th January.

In two manors in Durham, there is no custom for surrendering to the uses of the will, but the tenant divests himself of the legal estate, and by surrender vests it in a trustee, who subscribes a memorandum or defeasance, that the surrender is to the uses of the surrenderor's will. In this case the father and maternal grandfather of the testator, R. N., being both copyholders, had respectively caused their copyhold tenements to be surrendered to the other, who had subscribed the usual defeasance. The legal estate in both descended to the testator. But with regard to the tenements in the manor of Houghton, they were devised by the father of the testator to trustees, to the intent that his widow might receive an annuity thereout, and subject thereto to the testator, R. N., in fee. The widow being alive at the time the testator, R. N., made his will, and died, it was held, that the copyholds in the manor of Houghton passed by his will.

With respect to the tenements which were in the other manor, the testator's maternal grandfather, who had the beneficial interest in them, devised them unto trustees, upon trust for the testator, R. N. Held, that there being nothing to separate the legal estate and equitable interest, the equitable interest had merged in the legal estate in the testator, and could not be devised by him according to the

1836.—*Nicholson v. Nicholson.*

custom of the manor. Held, that his widow was entitled to free bench, and the heir, subject thereto, to the inheritance, but they taking benefits under the will, were bound to elect.

ROBERT NICHOLSON, being seised of freehold and copyhold estates, made his will on the 30th of April, 1817, and thereby confirmed an annuity of 500*l.* a year given to his wife by a settlement on their marriage, and also gave her an additional annuity of 500*l.* and a legacy of 1,000*l.*, and all his household goods, coaches, china, books and wine; and he gave unto Elizabeth Nicholson, the widow of his late father, 500*l.* a year during widowhood, and confirmed to her an annuity of 500*l.* (given by his father during her widowhood) during her life, notwithstanding she should marry again; and he declared that the provision made by his will for his wife was in bar of her dower and thirds at common law, and all other claims by law or custom upon his real or personal estate: and he gave, devised and bequeathed all and singular his freehold, copyhold and leasehold messuages, lands, hereditaments and real estate, and all his personal estate and effects, unto trustees to sell the real estate, and to convert the personal estate into money, *and out of the [*320] moneys, the produce of his real and personal estate, to pay his debts, funeral expenses and legacies, and to invest and apply the surplus in payment of portions to his younger sons and daughters, and, subject thereto, to apply it to the maintenance of his eldest son until he attained twenty-one, and then to transfer the principal to him.

The testator died, leaving Margaret Nicholson, his widow, two sons and two daughters.

A supplemental bill in this cause set forth the history of the copyholds as follows:—That on the 30th of May, 1780, lands in the manor of Houghton in the county of Durham were surrendered to Thomas Simpson, a grandfather of the testator, his heirs and sequels, in right according to the custom of the manor, and Thomas Simpson was thereupon admitted tenant of the hereditaments. A defeasance was subscribed that the hereditaments were so surrendered upon such trusts as Thomas Nicholson the elder,

who had purchased the same, should limit, devise, declare and appoint; and in default thereof, in trust for Thomas Nicholson the elder and sequels in right.

A similar surrender of another property in the same manor to Thomas Simpson in trust for Thomas Nicholson, was made on the 17th of November, 1789. Thomas Simpson had two daughters; one of them, Eleanor, married Thomas Nicholson the elder, but she died in her father's lifetime. Thomas Simpson died in the month of August, 1802, leaving Thomas Nicholson the younger, Robert Nicholson, the testator, and two others, his grandchildren by his daughter Eleanor, and also leaving a daughter

Elizabeth. This daughter Elizabeth and Thomas Nicholson the younger, were, of course, the co-heirs of *Thomas Simpson, and they were also his co-heirs according to the custom of the manor of Houghton. Thomas Nicholson the younger, and Elizabeth Simpson both died, leaving the testator their heir at law, and heir according to the custom; so that the whole legal estate of the copyhold became vested in the testator, Robert Nicholson.

Thomas Nicholson, the elder, by his will dated 14th January, 1811, gave all his lands in Houghton, &c., and all other his freehold and copyhold messuages and hereditaments unto John Goodchild and Christopher Bramwell, their heirs and assigns, to the intent that Elizabeth, his second wife, might, during her life, in case she should so long continue unmarried, have and take an annuity of 500*l.* out of the said hereditaments; and in the event of her second marriage, that she might have and take an annuity of 200*l.*; and subject thereto to the use of the plaintiff, Robert Nicholson the elder, his heirs and assigns forever.

Thomas Nicholson the elder, died on the 26th of January, 1811.

On the 14th of November, 1782, two other surrenders of lands in the manor of Easington, in Durham, were made to Mary Simpson and Thomas Nicholson the elder; they were admitted

tenants, with a defeasance that it was to such uses as Thomas Simpson should by will appoint.

Thomas Nicholson the elder survived Mary Simpson; and upon the death of the former, he left Robert Nicholson, his eldest son and heir at law, in whom the legal estate in the last mentioned lands became vested.

Thomas Simpson, by his will dated the 24th day of February, 1802, after giving an annuity of 30*l.* a year *to [*322] his servant during her life, and several pecuniary legacies, gave all his messuages, hereditaments and real estate of whatsoever tenure unto Thomas Nicholson the elder and Quintin Blackburn, and their heirs, upon trust, in the event which happened, for his grandson, Robert Nicholson the elder, his heirs and assigns forever; and the testator thereby charged in the first place his personal estate, and in the next place his real estate, so far as any deficiency should happen, with the payment of all his just debts, legacies, annuities and funeral expenses.

Quintin Blackburn survived Thomas Nicholson the elder.

The steward of the manor of Houghton gave a certificate as follows: "I, the undersigned, do certify, that I have for forty years last past been, and now am, the acting deputy steward as well of the manor of Houghton, as of the several other manors of and belonging to the see of Durham in the county of Durham, and am well acquainted with the customs thereof as to the copyholds in or within, or held of the said several manors, such customs being similar in all and each of the said manors: that by the customs of the said manors a copyhold tenement, that is, the legal estate, being vested in the owner thereof, was not, previous to the act of 55 G. III, c. 192, devisable by the owner or tenant so seised thereof by his will: that when any such copyholder died seised, that is, of the legal estate, his widow is, by the custom of the manor, entitled to the whole tenement for her life in her widow right and as her free bench, subject to which widow right and free bench, the copyhold tenement descends to the

[*323] heir as at the common law: that in *order to enable the copyholder or owner so seised to devise his copyhold by will, it is and has been usual for him to divest himself of the legal estate by surrendering the tenement, or otherwise having it vested in a trustee, (who is thereupon admitted, and is the lord's tenant,) and his sequels in right, with a memorandum or defeasance subscribed to the surrender, declaring that the premises are thereby so surrendered upon such trusts as the surrenderor, or the person having or entitled to the equitable or beneficial interest, shall by will appoint; and in default thereof, in trust for him, his heirs, sequels in right and assigns. But it is understood in practice, that without any particular previous surrender being passed for such purpose, the owner of the same equitable estate, (the legal estate being vested in a trustee,) may devise by will such his equitable estate."

The master found to the effect of this certificate; and that without any particular previous surrender for the purpose, the owner of a mere equitable estate in a copyhold tenement, the legal estate being vested in another person, may, according to the custom of the manor, devise by will such equitable estate.

The steward sent a similar certificate in respect of the manor of Easington, and the master found according to it.

The master also found, that the premises were of copyhold tenure, and held by copy of court roll.

Robert Nicholson the elder died, and left the defendant Margaret Nicholson, his widow, and Robert Nicholson the younger his heir at law, and customary heir, to an infant; and the legal estate in the said copyhold hereditaments became vested in him.

[*324] *Margaret Nicholson alleged, that she was entitled to her free bench.

Mr. *Bickersteth*.:—Upon the will of Robert Nicholson the elder two questions arise; first, whether the copyholds pass by his

will? if they did not pass, the widow would be entitled to her free bench for life, and then they will go to the eldest son; and if they did not pass, the question is, whether the son shall not be put to his election?

Thomas Nicholson being entitled to the equitable estate, devised it to trustees, their heirs and assigns, to the intent that his widow should receive an annuity for her life; she is now living: there is, therefore, an estate in the trustees and their heirs for the purpose of this annuity; and so long as that annuity subsists, there is a separation of the legal and equitable estate.

He subjected all the estates to the payment of his debts, which constituted a charge in the hands of the trustees. The copyhold estates did pass by the will of Robert Nicholson, and if they did not, the widow and eldest son must elect. Those copyhold estates, with other lands, the trustees were directed to sell: the eldest son cannot participate in the benefit of the sales unless he elect to confirm the will. The testator has devised his copyholds generally; but we have evidence that he did intend to devise these particular copyholds. The general expression "all my copyholds" is sufficient. *Blunt v. Clitheroe*; (a) *Strutt v. Finch*, before Sir J. Leach, Vice-Chancellor; (b) *Oxenforth v. Cawkwell*; (c) *Wentworth v. Cox*. (d)

*Mr. Preston, for the heir at law and the widow:— [*325]
The equitable estate must be extinguished in the legal.
The cases are collected in the book on Merger, 327. It was decided in the case of *Goodright, Lessee of Alston v. Wells and others*, (e) in favor of the person who had the legal estate. I must admit the question of election arises, *Hewlet v. Wilks*; (g) but I do not admit it as to all the testator's copyholds; and I

(a) 10 Ves. 589.

(b) 2 Sim. & Stew. 229.

(c) 2 Sim. & Stew. 558.

(d) 6 Mad. 363.

(e) Douglas, 771.

(g) Ambler, 430.

must take leave to say, that the cases cited from 10 Ves., and elsewhere, go beyond the law. I do not mean to say, that if the court sees it to be clear that copyhold lands not surrendered were intended to pass by the will, this court has not power to give effect to it.

Mr. Jacob with Mr. Preston :—The copyhold in Houghton was vested in the testator ; the equitable estate was governed by the will of Thomas Nicholson ; Robert Nicholson was entitled, subject to the annuity given by that will : and it has been made a question, whether the annuitant and the trustees had a legal estate interposed ? But we contend that it did not prevent the union. In *Wade v. Pagett*,^(a) Lord Thurlow held, that where the estates unite the equitable estate must merge in the legal. In *Phillips v. Bridges*^(b) it was held, that a merger did not take place ; but there the equitable estate was in tail.

With respect to the copyhold in the manor of Easington, the case is more clear, there being no devise to trustees, but only a mere charge of debts—the testator was not in a situation to devise. The next question is, whether the infant heir is [*326] bound to elect ? *and that depends upon this, whether the court finds an intention in the testator that the copyholds should pass ? I cannot dispute that he did so intend as to the copyholds in Houghton ; but as to the estate in Easington, there is no means of collecting the intention, and the words of the testator are otherwise satisfied.

The grants are not at the will of the lord, but the master has found that they are copyholds ; and so they are to a certain extent, but they are commonly designated customary property,—they are *not* in their nature devisable. The customs of the manor did not admit of a surrender to the uses of a will ; but the mode was to surrender the estate to a trustee, who subscribed a defeasance that he would hold to the use of the will. And the court will consider the question, whether the expression “all

(a) 1 Brown, 364.

(b) 3 Ves. 126.

copyholds" can extend to customary estates not devisable? And upon the same principle the court may be told, that the words "all my copyholds" apply to customary estates mentioned; but not to all, there being sufficient otherwise to answer the words of the will. With respect to the widow she must elect.

THE MASTER OF THE ROLLS:—I am of opinion that it is a good devise as regards the Houghton estate; but with respect to the Easington lands it must be referred to the master to inquire, whether it will be for the interest of the widow and infant to elect.

Declare, that the defendant Robert Nicholson, the heir at law of Robert Nicholson, the testator, was trustee of the legal estate in the copyhold estates held of the manor of Houghton for the devisees in trust under the will of Robert Nicholson the elder, the testator; and that *the equitable interest [*327] therein was vested in them on the trusts of the will.

That the copyhold estates held of the manor of Easington did not pass by the will of Robert Nicholson, and that Robert Nicholson, the heir at law, was entitled thereto, subject to the free bench of Margaret Hammond, late Margaret Nicholson, the widow of the testator, Robert Nicholson.

That the heir at law and widow ought to elect; and that the master inquire and report, whether it will be for their interest to elect to take under or against the will of Robert Nicholson.

The master reported, that it was for their interest that they should elect; and that, subject to the debts and charges by the will of Robert Nicholson the elder, the heir at law was entitled to the moneys which had arisen from the sale of the real and personal estate on his attaining twenty-one.

 1830.—Lynn v. Ashton.

July 2d.—This cause came on as a short cause, when the counsel for the widow and infant heir elected to take under the will agreeably to the master's report.

Reg. Lib. B. 1829. fol. 609.

[*328] *ROBERT LYNN, AND ELIZABETH, HIS WIFE, WILLIAM LYNN, AND WILLIAM BEWICK LYNN, *Plaintiffs*; AND JOSEPH ASHTON, *Defendant*.

Settlement.—Appointment.—Feme Covert.

ROLLS.—1830: Thursday, 28th January.

Stock settled on marriage to the separate use of the intended wife, and afterwards as she shall appoint. She assigned her life interest to two persons for certain purposes, and appointed the capital to the same purposes.

Decreed, that the trustees transfer the stock accordingly.

BY an indenture of settlement made previously to the marriage of the plaintiffs Robert Lynn and Elizabeth Lynn, dated 28th February, 1797, between the plaintiff Robert Lynn, of the first part, the plaintiff Elizabeth Lynn, (then Elizabeth Cannon, spinster,) of the second part, and the plaintiff William Lynn and William Green, of the third part. It was witnessed, that William Lynn and William Green, or the survivor of them, or the trustees or trustee for the time being, in their or his stead, should stand possessed of a sum of 650*l.* of 3 per cent. consols, (which had been previously transferred into the names of William Lynn and George Lynn,) and all the dividends and interest then due, or to become due thereon, and all money to be received on account of such debts and sums of money as were due or belonging to Elizabeth Lynn prior to the marriage, (and which debts and money were, by the now stating indenture, assigned by Elizabeth Lynn to William Lynn and William Green, their executors, administrators and assigns,) after the solemnization of the intended marriage, upon trust for the sole and separate use of Elizabeth Lynn, her executors, administrators and assigns, notwithstanding her coverture, and that the trustees should permit

1830.—*Lynn v. Ashton*.

Elizabeth Lynn to receive all the said trust moneys, and the dividends, interest, savings and accumulations thereof, for and during her natural life, for her own use, and notwithstanding *her then intended coverture, and after her [*329] death, upon trust for such uses, ends, intents and purposes, as Elizabeth Lynn should, notwithstanding her then intended coverture, by any deed or writing to be by her duly executed, order, give, declare, direct or appoint, and in case of no such order, gift, direction, declaration or appointment for her children, and in default of children, for her next of kin.

Various sums of money were from time to time received by the trustees for the time being, on account of the debts and sums of money assigned by or comprised in the settlement; and the 650*l.* 3 per cent. consols was, by the investment of the said debts and sums of money, increased to the sum of 1,400*l.*

The defendant, Ashton, was afterwards appointed trustee instead of Green, and the 1,400*l.* was transferred into the names of him and the plaintiff William Lynn.

By an indenture dated 23d June, 1827, between Robert Lynn and Elizabeth his wife, of the one part, and William Lynn and William Bewick Lynn, of the other part, after reciting as before stated, and that the plaintiff Elizabeth Lynn was desirous (with the privity of Robert Lynn) of assigning her life interest in the dividends of the 1,400*l.* 3 per cent. consols to William Lynn and W. B. Lynn, their executors, administrators and assigns, and also of appointing the principal thereof, after her death, unto the last mentioned plaintiffs, their executors, administrators and assigns, to the intent, that they might cause the 1,400*l.* 3 per cent. consols to be transferred into their names, and that they might afterwards transfer the sum of 1,200*l.*, part of the same, in the manner necessary for obtaining in lieu thereof a government annuity for the lives of the plaintiffs Robert and Elizabeth, *his wife, and the life of the survivor, and might retain [*330] the residue of the 1,400*l.* stock for the purposes therein-after mentioned; it was witnessed, that Elizabeth Lynn, for the

1830.—*Lynn v. Ashton*.

nominal consideration therein mentioned, bargained, sold, assigned, transferred and set over, all her life interest in the sum of 1,400*l.*, 3 per cent. consols, to William Lynn and W. B. Lynn, their executors, administrators and assigns, to hold unto the last mentioned plaintiffs, their executors, administrators and assigns; and it was further witnessed, that for the nominal consideration therein mentioned, the plaintiff Elizabeth Lynn, with the privity and approbation of the plaintiff Robert Lynn, did by that deed or writing, by her duly executed, order, give, declare, direct and appoint that the 1,400*l.* 3 per cent. consols should, after the death of Elizabeth Lynn, go and belong to William Lynn and William B. Lynn, their executors, administrators and assigns; and it was thereby agreed and declared between them, and by the parties thereto, that William Lynn and W. B. Lynn, and the survivor of them, or the executors or administrators of such survivor, should, with all convenient speed after the execution thereof, procure the sum of 1,400*l.* 3 per cent. consols to be transferred into the names of William Lynn and W. B. Lynn, or the survivor of them, or the executors or administrators of such survivor, for the purpose of obtaining, with all convenient speed, with 1,200*l.*, part of the 1,400*l.* stock, such government annuity as aforesaid, and upon trust as to the 200*l.* residue of the 1,400*l.* stock to or for the use or benefit of Robert Lynn and Elizabeth, his wife, in the manner therein particularly mentioned.

The bill stated the preceding facts, and that the defendant, the trustee, refused to join in transferring the 1,400*l.* 3 per cent. consols; and prayed that he might be compelled to join the [*331] plaintiff William Lynn *in transferring the said sum of 1,400*l.* 3 per cent. consols into the names of William Lynn and William Bewick Lynn, upon the trusts thereof declared in and by the indenture of the 23d June, 1827.

Mr. Pemberton and Mr. Purvis for the plaintiffs.

Mr. James for the defendant.

THE MASTER OF THE ROLLS :—This assignment defeats the in-

 1830.—Pritchard v. Draper.

tention, and gives an interest totally inconsistent with the intention: there certainly is no other person who has an interest. The trustees acquire by her assignment the life estate, and by the appointment the remainder over; there is no breach of trust.

Decreed as prayed, and the costs to be paid out of the fund.
Reg. Lib. B. 1829, fol. 567.

*BETWEEN GEORGE PRITCHARD, *Plaintiff*; AND CARTER DRAPER AND SIR THOMAS MARYON WILSON, BART., *Defendants*.(a) [*382]

Partnership.—Debts due to a Dissolved Partnership.—Costs.

WESTMINSTER HALL.—1830: 28th January.

Payment by a client to one of two partners, after the partnership has been dissolved, is a good payment.

If the debtor permits one of such partners to receive moneys, in the confidence that those moneys will be a satisfaction of the partnership debt, the retainer of those moneys is equivalent to an actual payment.

THE plaintiff and the defendant Draper were co-partners in the business of attorneys and solicitors, and the defendant Wilson was one of their clients.

The partnership was dissolved in October, 1817. This bill was filed by the plaintiff, to have an account of what was due from the defendant Wilson to the co-partnership; but before the defendant Wilson had put in an answer he died,—the suit was then revived against his executors. The cause came on to be heard on the 16th July, 1827, before Lord Gifford, Master of the Rolls, when his Honor decreed that it be referred to the master in rotation to tax the bill of fees, charges and disbursements of George Pritchard and Carter Draper; and that the master should take an account of what, if anything, was due and owing from

(a) Reversed, 1 Russ. & M. 191.

the estate of Sir Thomas Maryon Wilson, deceased, in respect of the said bill of fees, charges and disbursements; and the master was to be at liberty to state any special circumstances that might arise at the request of either party.

The master, by his report dated 11th November, 1878, reported that he had taxed the bill of fees, charges and disbursements of George Pritchard and Carter Draper, at the sum of 768*l.* 15*s.* 8*d.* And for the purpose of taking the account of what, if anything, was due and owing from the estate [*333] of Sir Thomas Maryon Wilson, he *had caused the defendant Draper to be examined on interrogatories; and he found by a claim laid before him on behalf of the defendants, which had been duly vouched by the production of proper vouchers before him, that Sir Thomas Maryon Wilson paid to the defendant Draper, on account of the said bill of fees, charges and disbursements, several sums of money, amounting together to the sum of 326*l.* 9*s.*, which being deducted from the sum of 768*l.* 15*s.* 8*d.*, the same was reduced to the sum of 442*l.* 6*s.* 8*d.*, which he found to be due and owing from the estate of Wilson, in respect of the said bill.

But being at liberty to state special circumstances, at the request of either party, he submitted to the court, at the request of the defendants, the executors of Wilson, the following circumstances:—

In and previous to the year 1814, the defendant Draper was the solicitor of Sir Thomas Maryon Wilson. In that year the plaintiff and the defendant Draper, entered into co-partnership as solicitors, and continued in such co-partnership until October, 1817, when the same was dissolved. During the continuance of the co-partnership, Sir Thomas Maryon Wilson employed the plaintiff and the defendant Draper as his solicitors; and Sir Thomas Maryon Wilson was aware of the dissolution shortly after the time thereof. On the 25th of July, 1818, a joint bill of costs was delivered by Draper to Sir Thomas Maryon Wilson, the amount of which bill was 867*l.* 5*s.* 5*d.*, including a sum of 67*l.* 17*s.* 5*d.*, as the balance of a former bill of the co-partner-

ship; and the bill was accompanied by a letter, dated 25th July, 1818, as follows:—

“ Dear Sir :—At length I am enabled to send you my accounts, which are three in number: the first is *due [*334] to Pritchard and Draper, of 867*l.* 5*s.* 5*d.*, from which, I believe, there have been received the several sums of 50*l.*, 26*l.* 9*s.*, 28*l.* and 800*l.* The second is also due to Pritchard and Draper, and is the separate account of the parish of Fletching. The third account is owing to Draper and Bird, wherein I have given you credit for the money received from Furness for rent. At the bottom of the first bill I have not put the receipts, on account, lest by any means I have made a mistake; but I am not conscious of having so done.

“ I remain, dear sir,

“ Most respectfully yours,

“ CARTER DRAPER.

“ Sir THOMAS MARYON WILSON, Bart.”

In a letter by the plaintiff to the defendant Draper, bearing date 27th October, 1818, the plaintiff uses the following expression: “ Will Sir T. M. W. soon settle?” And it was admitted that Sir Thomas Maryon Wilson was the person alluded to by the letters Sir T. M. W.; and that the plaintiff, George Pritchard, knew and was well aware that Sir Thomas Maryon Wilson continued to employ the defendant Draper, as his solicitor after the dissolution of partnership. On the 17th day of February, 1821, the plaintiff gave a notice to the solicitor for Sir Thomas Maryon Wilson, not to pay Draper the balance of any bill or bills delivered in by him as due from Sir Thomas Maryon Wilson to the late firm of Messrs. Pritchard and Draper. On the 22d of February, 1821, the plaintiff and the defendant Draper, signed an agreement, by which the defendant Draper agreed to give the plaintiff his bond for securing 750*l.* payable by instalments; and to assign to the plaintiff the debts contracted during the partnership, and which then remained outstanding and due to the said firm of “ Pritchard and Draper;” and the defendant Draper, undertook within one month to supply the plaintiff with

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[*835] a list of the debts *then still remaining outstanding and unpaid to the said co-partnership firm of "Pritchard and Draper;" but it did not appear before the master that such list had been supplied.

On the 22d of February, 1821, the plaintiff delivered a copy of such agreement to the solicitors for Sir Thomas Maryon Wilson; and the plaintiff, on the 28th of February, 1821, wrote and sent the letter to Sir Thomas Maryon Wilson in the bill mentioned explanatory of such notice: that after the dissolution of co-partnership, the defendant Draper continued to act as solicitor and receiver of rents of estates of Sir Thomas Maryon Wilson, and continued so to act until September, 1820: that on the 22d of February, 1821, Sir Thomas Maryon Wilson filed his bill in this court against Draper, as his late attorney and solicitor, and agent and receiver, for an account; and that the defendants, William Nottidge and Richard Black, with John Stride, now deceased, as executors of Sir Thomas Maryon Wilson, filed a bill of revivor of such suit against the defendant Draper, and such suit was still pending.

That the plaintiff had examined the defendant Draper, as a party in this cause upon interrogatories; and he found by his examination put in thereto, that the defendant Draper stated that he did not, since the dissolution of the partnership, settle and adjust any account with Sir Thomas Maryon Wilson, deceased, nor did Sir Thomas Maryon Wilson ever adjust or agree with the examinant upon any account or accounts in which credit or credits was or were given to him for any sums of money as having been paid to the examinant expressly for or on account of any bill of costs, or for moneys retained by the examinant expressly for or on account, or in satisfaction, or part satisfaction, of any bill of costs; *nor did Sir Thomas Maryon Wilson, to the knowledge and belief of the examinant, ever *debit* the examinant with any sum or sums of money expressly on account of any bill of costs. And the examinant stated that Sir Thomas Maryon Wilson did not ever in writing, or in account in writing, expressly allow to the examinant any

sum or sums of money expressly in payment and satisfaction, or in part payment or satisfaction, of any account; and the examinant stated that his accounts with Sir Thomas Maryon Wilson had not been settled.

And the defendants, the executors, had also examined the defendant Draper, as a party in this cause upon interrogatories; and by his examination he stated that he did receive from, and was paid by, Sir Thomas Maryon Wilson, Baronet, deceased, in manner thereafter mentioned, the whole amount of the bill of costs of the late partnership between the examinant and the plaintiff, due from Sir Thomas Maryon Wilson at the time of the dissolution of the partnership. And the examinant stated that the bill of costs was paid, or he received the amount thereof at various times and by various sums of money, some of which sums were paid to the examinant by Sir Thomas Maryon Wilson, and others of them by moneys retained by the examinant by the direction, or with the permission, of Sir Thomas Maryon Wilson, out of moneys belonging to him which had been received by the examinant: and the examinant stated that, to the best of his recollection and belief, there was not any person present when such moneys, or any of them, were paid to the examinant, or when Sir Thomas Maryon Wilson directed or permitted the examinant to retain such moneys as the examinant did retain: and the examinant stated, that he had in the schedule to his examination underwritten set forth a true statement or account, to the best of his belief, of the moneys *which [*337] the examinant so received from Sir Thomas Maryon Wilson or retained; but he did not recollect or believe, that such moneys, or any part of them, were retained by the examinant expressly on account of such bill of costs; for when he had money in his hands, Sir Thomas Maryon Wilson told the examinant to retain what he wanted, as money would be of service to him, (the examinant,) and the examinant stated, that he accordingly retained the moneys in the said schedule mentioned. That to the best of his belief there was not any money due from the estate of Sir Thomas Maryon Wilson, deceased, on account of the bill of costs of the late partnership: and the examinant

stated, that the said bill of costs was, in fact, paid and settled on the 10th of September, 1820, when the sum of 282*l.* 17*s.* 5*d.* was retained by the examinant: and the examinant stated, that he did not recollect that anything particular passed on the occasion; but it was of course understood by him, and he believed by Sir Thomas Maryon Wilson also, that credit was to be given by the examinant in his accounts with Sir Thomas Maryon Wilson for the sums so paid to and retained by the examinant, when the account should, at a future time, be settled between the examinant and Sir Thomas Maryon Wilson; and for that reason, also, the examinant stated that he did not make or give, or was not required to make or give, any receipts or receipt for the moneys which were so paid to, or retained by, the examinant as aforesaid.

The cause now came on to be heard upon further directions.

Mr. *Treslove* and Mr. *Oliver Anderdon*, for the plaintiff:—The master has found that there is a debt of 442*l.* due to the firm, and the master's finding was correct. There is no pretence [*338] for saying that there was *ever a payment of the partnership debt to one of the partners. Draper had no authority to apply the money received by him in his private character in discharge of the partnership debt; and if Wilson had brought an action against Draper, as his receiver, the latter could not have insisted upon such an application, or have pleaded the partnership debt by way of set-off. *Todd v. Reed*,^(a) will illustrate this view. In the case of *Jeffs v. Wood*,^(b) the then Master of the Rolls held that stoppage was no payment at law nor was it of itself payment in equity.

Mr. *Pemberton*, for the executors of Sir Thomas Wilson:—The question is, whether, upon the evidence found by the master, he ought not to have reported that the debt was satisfied? With respect to the evidence of Draper—

(a) 4 B. & A. 210.

(b) 2 P. W. 129.

Mr. *O. Anderdon*.:—He is not examined as a witness, but as a party.

Mr. *Pemberton*.:—The accounts remained in the possession of Mr. Draper, for him to wind them up. Mr. Pritchard did very little towards them. Mr. P. asks, in a letter twelve months afterwards, Will Sir Thomas Wilson settle the account? Mr. Draper had been employed by Sir Thomas Wilson before the partnership, and continued to be so employed during the partnership. Had not Sir Thomas Wilson a right to treat Mr. Draper as before? Mr. Draper goes on receiving Sir Thomas Wilson's rents, and that Mr. Pritchard considered that Sir Thomas Wilson had a right to pay Draper is to be concluded by that. Mr. Pritchard actually gave Sir Thomas, in 1821, notice not to pay Draper. Up to that time these payments to him were not disputed; but now finding Draper to be insolvent, he attempts to get all the partnership bills from Sir Thomas Wilson: the whole question between these parties might have been tried at law.

*Mr. *Cooper*, also for the executors, having handed in [*339] a receipt dated on the 7th October, 1817 :—The partnership was dissolved on the 17th October; and that document shows that 300*l.* was received during the partnership: it is signed "For Pritchard and Self, C. Draper." The court can never come to a conclusion that this money must be again paid. In 1821 Draper assigned to Pritchard the outstanding debts; and it was agreed that a list of them should be made out, but it never was made out: however, there is no doubt that if a payment is made to one of two partners, after notice from the other not to do so, that would be a payment in the parties' own wrong.

THE MASTER OF THE ROLLS :—Pritchard had a demand upon his partner, and that demand is satisfied by an assignment of debts, and a bond for 750*l.*, and to know that that would have been satisfaction of his demand upon his partner, he must have calculated what was due to him: it is impossible that that sum of 750*l.* could have been secured without reference to what was due.

1830.—Pritchard v. Draper.

Mr. *Cooper* continued;—Before the master I cited authorities that payment to one of two partners was a good payment, and I proved that all the demand had been paid before the notice of 1821, and that two payments had been made during the partnership; but the master has reported against us. From the examination of Mr. Draper, it appears that the debt was satisfied in 1820.

Mr. *Treslove* in reply:—The bill alleges that Draper refused to join in an action at law, and that is proved: at law we must have been non-suited. The receipt for 300*l.* was given on the [*340] 7th October, 1817, but the defendant Wilson does *not pretend to have receipts for the other sums. In October, 1818, Pritchard says to Draper, "Will Sir Thomas Wilson soon settle?" It was very proper to apply to him, he having been concerned for Sir Thomas Wilson; but the question remains, whether payments have been made. Draper, in his examination, says that he never received any moneys specifically in payment of the partnership bills, but he received rents. To this hour we do not know the state of the account; and on our notice to Sir Thomas Wilson, he immediately filed a bill against Draper for an account.

THE MASTER OF THE ROLLS:—If the case made by the bill had been established by the master's report, there could have been no doubt that the finding of the master would have been perfectly consistent with the law upon such cases; but it so happens that the case made by the master's report is totally different from the case made upon the bill. In the bill it is stated, that after the dissolution of the partnership, and after an assignment by Draper to his partner, Pritchard, of all the partnership debts, and after notice to Sir Thomas Wilson of that assignment, he, Sir Thomas Wilson, paid to Draper the partnership debt. Now it appears that the payment insisted on upon the part of Sir Thomas Wilson, or rather upon the part of his executor, he being dead, was a payment due after the dissolution of the partnership, but prior to the assignment made by Draper to Pritchard, and prior, consequently, to any notice of that assignment given to Sir

1890.—Pritchard v. Draper.

Thomas Wilson. It is perfectly clear, after a dissolution of partnership, unless there be notice to the debtors of the partnership, that partnership debts are to be paid to a particular partner, payment by a debtor to any one partner is a good satisfaction of the partnership debt. If the debtor in the place of payment permits one of the partners—gives him authority to *re- [*341] ceive moneys which are due to him, the debtor, in the confidence that those moneys, when received, will (like payment by the debtor) be a satisfaction of the partnership debt, there can be no doubt that a retainer of those moneys by a partner receiving them is equivalent to actual payment by the debtor to the partnership. It must be assumed here, that Sir Thomas Wilson gave authority to Draper to receive moneys due to him, in the confidence that those moneys, when received, were to be considered as payments of the partnership debt. I am of opinion, therefore, that the master has mistaken the law, that his report is incorrect, and cannot be sustained.(1)

Bill dismissed with costs up to the hearing, but no subsequent costs.

Reg. Lib. B. 1829, fol. 1259.

(1) The authority of each party to settle unclosed affairs of the firm, continues after the dissolution; and a payment made to one; an agreement made by one to set off a debt due the firm against his private debt, or other arrangement with one for a settlement binds all. But if any partner, upon the dissolution, agrees to surrender his authority, settlements by him with those having notice of his agreement will not bind the others. The notice may be inferred from circumstances. *Combs v. Boswell*, 1 Dana, 475. The general rule is, that the power of one partner to bind the firm, ceases with the existence of the partnership. *Fisher v. Tucker*, 1 McCord's Ch. Rep. 170. After dissolution, a power to receive and pay all debts will not authorize one partner to indorse a bill of exchange. *Ib.* After the dissolution of a partnership, one partner cannot bind the other by the acknowledgment of a debt which is neither legally or equitably due, or by giving a note for the same, although at the time of such acknowledgment, as of the giving of the note, the supposed creditor had no knowledge of the dissolution. *Brisban v. Boyd*, 4 Paige, 17. After the dissolution, the admission of one partner will take the case out of the Statute of Limitations. *Fisher's Executors v. Tucker*, 1 McCord's Ch. Rep. 169. A power to receive and pay all debts will not authorize one partner, after the dissolution, to indorse a bill of exchange. *Ib.* Where, after the dissolution of the partnership, a debt was placed by the firm at the disposal of one partner, and information thereof was given to the debtor, such partner has a right to assign it as a security for his private debt,

1830.—Pritchard v. Draper.

and in equity the assignee may maintain a suit for it against the debtor. *M'Lanahan v. Ellery*, 3 Mason, 269. The receipt of money by one partner, in the partnership name, does not bind the firm after notice of a dissolution has been had by the persons who paid it or caused it to be paid. *Colton v. Evans*, 1 Dev. & Batt. 284. When a partnership owns land, a difficulty in the title of it is no objection, upon a dissolution and settlement of the partnership, to order a sale of such title as the partnership has. *Ib.* A promise made by one partner, after the dissolution of a partnership, that the firm would pay a debt of the partnership, which is barred by the Statute of Limitations, will not revive the debt against the other partners, unless such partner have a new authority given him for that purpose by the others. *Beckote v. Wyne*, 7 Yerger, 534. Where a debt is due from a co-partnership, and one of the co-partners dies leaving the other co-partner surviving and perfectly responsible; and the creditor neglects to pursue his remedy against the survivor until the cause of action is barred, as against him, by the Statute of Limitations; whether such creditor can afterwards come into a court of equity to obtain satisfaction out of the estate of the decedent, although the surviving co-partner has then become insolvent? *Quære.* *Trustees of the Leake and Watts Orphan House v. Lawrence*, 11 Paige, 80. Where one member of a co-partnership firm dies, a creditor of the firm cannot sustain a suit in Chancery against the representatives of the deceased co-partner, to recover his debt out of the decedent's estate, without showing in the bill that the surviving co-partner is insolvent, or stating some other sufficient reason for not proceeding at law against the surviving co-partner. *Ib.* A creditor of a partnership may proceed at law against a surviving partner, or may, in the first instance, go into equity against the representatives of the deceased partner, without having first exhausted his remedy at law against the surviving partner. *Nelson v. Hill*, 5 How. 127. *Contra, Lawrence v. The Trustees of the Leake, &c., Orphan House*, 2 Denio, 577. In general, a surviving partner is liable at law. *Burwell v. Cawood*, 2 How. 575. Although he may be a proper party to a suit in equity, as being interested to contest the plaintiff's demand, no decree can be made against him, unless some other equity intervene. *Ib.* When a suit is sustainable against the representatives of a deceased partner, the bill may, under the Revised Statutes of New York, (Vol. II, (2d ed.), p. 228, sec. 52,) be filed at any time within ten years after the right to relief accrued. *Lawrence v. The Trustees of the Leake, &c., Orphan House*, 2 Denio, 577. And where the surviving partner is solvent at the death of the deceased, and afterward fails, the ten years allowed for filing a bill to reach the assets of the deceased partner commences at the time of such failure. *Ib.* Whether a suit in equity, against the representatives of the deceased partner, brought after the Statute of Limitations had barred the action at law against the survivor, can be sustained? *Quære.* *Ib.* Notes given by one member of a firm, on its dissolution, to his partners, became their individual property, and, in the possession of their assignee, cannot be subjected to pay the creditors of the firm. *Belknap v. Crane*, 11 Ohio Reports, 411.

1830.—Hodder v. Ruffin.

HODDER v. RUFFIN.

Vendor and Purchaser.

WESTMINSTER HALL.—1830: 29th January.

A purchaser in this court having resold with a profit before his purchase was confirmed, the person to whom he has sold, is to be considered as a substituted purchaser, and must pay the additional purchase money into court, for the benefit of the parties to the suit.

UNDER a decree for sale in this cause in 1806, Mr. John Simmons, in 1808, purchased lot 36, at the sum of 1,020*l*. on behalf of a Mr Thomas Milton. Two of the plaintiffs employed George Hiffey to open the biddings at 1,200*l*., which he did, and the court ordered him to pay 300*l*. into court by way of deposit, which was accordingly done. At the next sale no person offered beyond the 1,200*l*. On the 31st of December, 1808, Richard Martin, one of those two plaintiffs, agreed with William Alston, that the latter should be considered the purchaser, and he accordingly repaid them the 300*l*. Subsequently Alston verbally agreed with William Hills, that the latter should take the purchase off his hands. In June, 1813, Messrs. C——, the plaintiff's solicitors, wrote Alston to remit them the remaining 900*l*., *that they might pay it into court; and he [*342] having communicated it to Hills, the latter remitted the 900*l*. to the Messrs. C——. In 1813, Hills paid to Alston the sum of 600*l*., of which 300*l*. was the deposit, and the remaining 300*l*. for interest thereon and as a profit.(a) Messrs. C—— did not pay the 900*l*. into court; but on the 2d of May, 1818, obtained the master's report, which found that Hiffey made the advance as agent to William Alston. By a subsequent report, the master found that the Messrs. C——received the 900*l*. in part performance of the contract of purchase of the said William Alston, and at his request and by his direction, and for the purpose of being paid into court by them as solicitors to the plain-

(a) So that Hills had to pay 1,500*l*. altogether for the purchase, being 300*l*. more than the price offered at the sale by the court.

tiffs; and that they had not then been in any manner employed by the said William Hills, as his attorney and solicitor, or otherwise.

Mrs. Burdett, the purchaser of another lot, claimed a right of passage, and brought an action, wherein the damages and costs amounted to 110*l.*, which was paid by the Messrs. C——. The balance due to Hills on the 900*l.* sent to C—— had been paid to him.

The Master found, that the 900*l.* would have purchased 1,590*l.* 8 per cent., bank annuities, and that the dividends thereon amounted to 725*l.*, both which sums the court ordered Messrs. C—— to pay, but they had gone out of the jurisdiction of the court. The master found an admission by William Hills, that the Messrs. C—— had repaid him the 900*l.* and interest. The petition prayed, that Alston or Hills might be declared the purchaser; and that they, or one of them, might transfer to the

Accountant-General 1,590*l.* 8 per cent. stock, and pay [*348] into the bank 725*l.* *cash for dividends down to July, 1828, and all subsequent dividends.

Mr. *Tinney* and Mr. *Wray* for the petitioners.

Mr. *Ching* for Hills.

Mr. *Kindersley* for the purchaser.

THE MASTER OF THE ROLLS :—In this case the order was not even confirmed when the 300*l.* profit of the resale was made. The court never confirms an order where the purchaser has made a profit, unless he bring the profit he has made into court. I can only look at Hills and Alston, the one as a purchaser, the other as a substituted purchaser; but neither of them have been confirmed by the court. I cannot allow Hills to say that he was not considered a substituted purchaser, although he was never confirmed. Hills underhand deals with Alston; he pays Alston what he ought to have paid into court; and Hills, instead

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of desiring to be substituted in the first place, filed a bill against Alston. If a man makes a contract before the party of whom he purchases has had his purchase confirmed, he becomes a purchaser under the court. This suit has not been conducted regularly: it is a most shameful case; and, in consequence of this very case, an order of court has been made that the solicitor for the plaintiff should not be solicitor for the purchaser. The commissioners recommended that order upon this very case. Mr. Alston enters into an agreement to transfer his contract before he had acquired a title under the decree of this court: this must be for the benefit of the parties in the suit, and not for his own personal profit. The parties to the suit became entitled to receive the 800*l.* and the 1,200*l.*; they are also entitled to receive *interest on the 1,200*l.* until the purchase is [*344] completed, from one or the other. The question is, who is to pay the 1,200*l.*? Alston must, of course, pay the 300*l.* profit, with interest from the time he received it from Hills, the remaining part of the 1,200*l.* must be paid by Hills.

I declare now that Hills shall be a substituted purchaser in the room of Alston; and that on payment of 900*l.*, minus the damages and costs in Mrs. Burdett's action, 180*l.*, (a) he shall have a good title and conveyance. Refer it to the master to consider what allowance should be made out of the 1,500*l.*, in respect of any incumbrance upon the title not noticed in the conditions of sale; and whether the action brought by Mrs. Burdett ought to have been defended, and was properly defended; and reserve the question, whether Alston or Hill are to be allowed the deduction.

(a) This seems to be subject to the reference.

BUTTER v. OMMANNEY.

WESTMINSTER HALL.—1830: 30th January.

An estate having been sold, in which the petitioners were interested, it was represented to them that a good title could not be made; and they were induced to

1830.—*Butter v. Ommanney*.

give a brief to counsel, to consent to the purchaser being discharged; they subsequently discovered circumstances which led them to conclude they had been deceived, and that, in fact, a good title could be made, and thereupon petitioned the court that the order might be discharged. The court discharged the order, giving the purchaser his costs, and referred it to the master to inquire whether a good title could be made. The solicitor for the petitioner to have the conduct of the inquiry.

MR. DIXON for the petitioner:—A freehold house had been sold in this cause to Alexander Snodgrass for 545*l*, and that sale had been confirmed absolutely. The petitioners are jointly interested with the plaintiffs and the other defendants, in the amount of the purchase money. On the 11th of December, 1829, the plaintiffs' solicitors wrote a letter to *the solicitors of the petitioners, with the copy of a petition to be heard at the Rolls on the Tuesday following, and desired them to give a consent brief to counsel; and that petition stated, that there was not a good legal covenant in a certain indenture, dated the 5th day of June, 1788, for the production of certain title deeds, and which title deeds, there was great reason to fear, were lost; and, therefore, it had been advised, that the purchaser could not be compelled to complete his purchase, and prayed that he might be discharged therefrom. In the confidence of this statement, the consent requested was given, and an order made thereon. The petition now before the court stated information subsequently obtained, by which they had concluded that the title deeds were not lost, and that even if they were, there was sufficient title, and prayed that the order might be discharged.

Mr. *K. Parker* for Sir Francis Ommanney.

Mr. *Phillimore* for other persons interested in the purchase money.

Mr. *Rolfe* for the purchaser.

Mr. *Wray* for the plaintiff and for Messrs. Horton & Son.

THE MASTER OF THE ROLLS:—I cannot hold these petitioners to a consent which was given on a representation that the title deeds were lost. They certainly acted under the presumption that

1830.—*Collisam v. Sams.*

the title deeds were lost. I must consider this case as if no consent had been given. The abstract was actually compared by Horton & Son with the deeds in the custody of Currie & Co. I must consider what would have been done *upon the [*346] original petition had not a consent been produced. I could not have compelled them to consent. If I cannot discharge the purchaser, must I not refer it to the master generally to inquire whether a good title can be made? The purchaser must be indemnified in respect of costs, for no misrepresentation can be charged to him. The proper course will be, to direct a general reference whether a good title can be made. If it shall appear that there is not a good title, then the inference will be, that the present petition is unnecessary, and that will have its influence in deciding on the costs of the reference. All I can now do will be to discharge the order, and to refer it to the master to inquire whether a good title can be made, and when it was made.

Let the solicitor of the petitioner have the conduct of this inquiry before the master; the purchaser to have his costs of this petition; the costs of other parties reserved. The purchaser to have leave to petition the court to be discharged from the purchase on the 13th of February, and the order not to be drawn up until after that day.

COLLISAM v. SAMS.

Will.

WESTMINSTER HALL.—1830: 1st February.

A testator having directed his executors to pay the interest of his residue to a woman during her life, and after her decease to divide the residue amongst the next of kin.

Held, the next of kin, at the time of testator's death, were the persons entitled.

By the will of the testator the executors were to invest the residue, "upon trust to permit Hannah Fowler from time to time, during her natural life, to receive the interest thereof; and after her decease upon trust to divide the same unto and amongst the next of kin, in a due course of administration.'

1830.—*Arnold v. Congreve.*

[*847] **Mr. S. Girdlestone*.:—The question is, whether, after the death of Hannah Fowler, the next of kin meant were those living at the death of the testator or the death of Hannah Fowler? I believe, in fact, it must be taken to mean the persons who filled the character of next of kin at the time of the death of the testator.

The MASTER OF THE ROLLS decided, that the next of kin meant were those at the time of the testator's death.

Reg. Lib. A. 1829, fol. 610.

ARNOLD v. CONGREVE AND OTHERS.

WESTMINSTER HALL.—1830: 4th February.

A testatrix directs that the interest of 6,000*l.* shall be paid to her son during his life, and at his death, one-half of the stock to go to the son's eldest male child living at the death of the testatrix; the other 3,000*l.* to be divided in equal shares between his other children lawfully begotten; but should the son of the testatrix die without leaving issue, then she gave the 6,000*l.* over to her two other children during their lives, and at their deaths to their issue; and if either of them should die without leaving issue, then to the grandchildren which should remain.

By a codicil the testatrix willed, that upon the death of each one of her children who had issue, that her grandchildren's share be settled upon them, to enjoy the interest during their lives, and afterwards to revert to their children:

Held, that in respect to the gift to the eldest male child of the son "living at my death," the limitation over by the codicil of the 3,000*l.* given to him by the will, is within the rules of law:

Held, that the gift of the 3,000*l.* to the other children of the testatrix's son, being general, extended to all the children he might have, either before or after her death; and that the limitation over by the codicil to their children, was therefore void.

THE testatrix, Susannah Olivier, by her will bequeathed as follows: "I leave and bequeath 12,000*l.*, 3 per cents. reduced annuities, which I have now transferred from the 4 per cent. stocks, the same to be put in trust in the hands of my three executors, to be employed in the following manner: One-half, or 6,000*l.* of the said trust, the interest thereof shall be for the use

of my son, Rev. Daniel Stephen Olivier, during his life, and shall be duly paid unto him as his property, and at his death, one-half, which will be 3,000*l.* said stock, shall revert to *my said son's eldest male child living at my demise, and [*348] the other half, or 3,000*l.* said stock, 3 per cent. reduced, shall be divided in equal shares between his other children lawfully begotten; but should my said son die without leaving issue, in that case the whole of his moiety or 6,000*l.*, 3 per cent. reduced stock, shall revert in equal shares between my other two children during their lives, and at their death it shall revert to their issue; or should either of them die without leaving issue, it shall in that case revert in equal parts to those of my grandchildren that shall then remain. The other moiety, or 6,000*l.* of the said 12,000*l.* 3 per cent. reduced stock in trust, shall be divided in equal shares between my two daughters, Julia Elizabeth Eyre, and Mary Esther Conybeare, the interest of which shall be duly paid them during their lives, and at their death each one's share shall revert to their children; but should either of my daughters die without leaving issue, in that case their share of the said trust, which will be 3,000*l.* 3 per cent. reduced, shall revert in equal shares between my surviving children; and at their death to revert to my surviving grandchildren in equal shares."

In one of the continuations of the will the following is contained:

"My three children, or their issue if they are dead, are to be joint residuary legatees, and are to share equally in all the residue of my fortune that is not otherwise bequeathed or disposed of."

And another clause is as follows:—

"I also leave and order to be put in trust by my executors 10,000*l.* bank stock, which now stands in my name, the interest of which shall be duly paid in equal shares to each of my said three children during their lives, *and at her [*349] death, each one's share or third of the said 10,000*l.* bank

1830.—Arnold v. Congreve.

stock shall revert in equal shares between their issue; but should either of my children die without leaving issue, in that case their share or third of the said bank stock shall revert to the remainder of my said children, and at their death to revert to their issue, or whatever issue shall remain from either of my said children, in equal shares."

And another clause is as follows: "All lapsed legacies are to return to the bulk of my fortune, excepting those that are entailed, and the 700*l.* 3 per cent. consols that I leave to Mrs. Passmer, which reverts to my son, the Rev. Daniel Stephen Olivier, after her death, at his own disposal, neither shall any unentailed legacy return to the bulk, (that I leave to either of my children in case they have any issue:) and all the legacies I leave to my grandchildren shall revert to their brothers and sisters if they die minors, or if such legacies are not entailed; and even should they die in my lifetime, their shares shall equally revert from the time this will is written."

The testatrix appointed Dr. William Conybeare, Sir Joshua Vanneck and the Rev. Daniel Stephen Olivier, executors of her will.

The testatrix made a codicil to her will, dated 80th March, 1801, in which is contained the following clause: "I now furthermore request that at the death of each one of my children who have any issue, that the 10,000*l.* bank stock, and also the 12,000*l.* 3 per cent. reduced, which by my will I have entailed upon my grandchildren, I would also have these, my remaining grandchildren's said share of the same two stocks be also [*350] settled upon *them, to enjoy the interest thereof during their lives, and afterwards to revert to their children lawfully begotten; but in default of any issue, they may dispose of it as they may think proper."

The testatrix in another codicil named the plaintiff an executor, instead of the Rev. Daniel Stephen Olivier.

The testatrix died in January, 1823, leaving her son, Daniel Stephen Olivier, since dead, and her daughters, Margaret Esther Conybeare, since deceased, and Julia Elizabeth Eyre, the widow of Sir William Congreve, Bart., her only children her surviving.

Daniel Stephen Olivier died in December, 1826: he had seven children, viz., two who died in the lifetime of the testatrix, Harriet Elizabeth, who attained twenty-one, but died unmarried and intestate in the lifetime of her father, but after the death of the testatrix, and two sons and two daughters, defendants to this suit. One of those sons, Daniel Josias Olivier, attained twenty-one, and had eight children, two of whom died infants and intestate, and the others were defendants to the suit, and all born after the death of the testatrix.

Anna Awdry Etough, another of the daughters of Daniel Stephen Olivier, attained twenty-one, had nine children, defendants to this suit, and they were also born after the death of the testatrix.

Henry Stephen Olivier, another son of D. Stephen Olivier, attained twenty-one, had three children all born after the death of the testatrix, and defendants to this suit.

*Mary Arnold Olivier, the other daughter of Daniel [351] Stephen Olivier, attained twenty-one, and is unmarried.

Lady Congreve is a widow without children. Mrs. Conybeare died leaving two children, who survived the testatrix, one of whom, a defendant to this suit, has had seven children, who are also defendants to this suit; but the other, after attaining the age of twenty-one years, died, and his widow is his personal representative.

The bill prayed that the rights of all parties might be ascertained.

Harriet Elizabeth Olivier, the daughter of Daniel Stephen Oli-

vier, who was born on the 18th of December, 1791, died in August, 1818, a spinster and unmarried; and upon her death, the defendant Daniel Josias Olivier, took out letters of administration: and the master found, that D. Josias Olivier received a letter, which had been produced to him, properly verified, from his father, the said D. S. Olivier, shortly after the death of the said Harriet Elizabeth Olivier, in the words and figures, or to the purport and effect following: (that is to say,) "My dear son,—Your sister's dear remains I have seen carrying into the room prepared for that purpose. In opening Henry's letter to add a few words, I saw that yours (upon glancing that way) was merely a continuation of the same melancholy subject. I think you tell him your sister expressed a wish, as far as you could understand her, that you should take some of her money: take it all, for God's sake, if you choose, my dear son; only let her just and lawful debts be paid, and peace to her remains. D. S. O.—My doors, as you well know, would always have been open to your sister, whom I loved whilst living, and shall most readily comply with her last wishes, and wish to see them performed. [*352] *Pray direct the Squire's letter, as I have mislaid the direction you left."

And he found, that, in consequence of such letter, the said Daniel Josias Olivier took out administration to the effects of the said Harriet Elizabeth Olivier, and possessed himself thereof, and afterwards divided the same between his brother, Henry Stephen Olivier, and his two sisters, Mary Arnold and Anna Awdry Etough, jointly with himself, the said Daniel Josias Olivier, in equal proportions.

And he found, that the said Daniel S. Olivier approved of such division, as appears by a memorandum signed by him, and dated the 8th of February, 1819, which had been produced to him the said master, which is in the words and figures following: (that is to say,)

"CLIFTON, 8th February, 1819.

"I, the Rev. Daniel Stephen Olivier, clerk, of Clifton, Bed-

fordshire, having waived all claim to the property of which my late daughter, Harriet Elizabeth Olivier, died possessed in favor of my son, Daniel Josias Olivier, clerk, do hereby approve of his dividing the same in equal shares with his brother, Henry Stephen Olivier, his sister, Mary Arnold Olivier, and his sister, Anna Awdry Etough.(a)

"D. S. OLIVIER."

Mr. *Bickersteth* for the plaintiff.

Mr. *Tinney* for Daniel Josias Olivier, the eldest son of Daniel Stephen Olivier:—He claims to be entitled to 3,000*l.*, half of the 6,000*l.*: he claims it absolutely. The codicil being so expressed *as to have given him, if it had been real [*353] property, an estate tail, and, consequently, the absolute interest in it, as being personal. There are many cases in support of this construction, founded upon *Wylde's Case* in 6 Co. 16.(b) In the codicil also, the limitation is to the children of her grandchildren generally, which not being confined to those living at her death, may include, therefore, not only those grandchildren born at the time of the death of the testatrix, but also any others afterwards born until the death of their parent; and the fund being divisible, it must be held, therefore, a gift to unborn grandchildren for life, and then to their issue; and such a limitation would be void as too remote, and rejected, though all the grandchildren as here were actually born, and *in esse* in the lifetime of the testatrix. *Leake v. Robinson*.(c) This includes the shares of all the grandchildren, and, of course, that of Daniel Josias Olivier.

THE MASTER OF THE ROLLS:—The testatrix, by her will, gives to the *eldest male child of her son living at her death*; and then

(a) On the effect of these letters there was much discussion; the result will be seen in the decree.

(b) *Hodges v. Middleton*, Doug. 415, 431, 2d. edit.; *Seale v. Barter*, 2 B. & P. 485; *Robinson v. Robinson*, 1 Burr. 38; *Totill v. Pitt*, 1 Madd. 488; *Murthwaile v. Jenkinson*, 2 B. & C. 358, and 3 B. & C. 191; *Jesson v. Wright*, 2 Bligh, 1; *Wooler v. Andrews*, 2 Bing. 126; *Hughes v. Sayer*, 1 P. W. 534.

(c) 2 Mer. 363.

the codicil limits the share of the eldest male child, as being one of the grandchildren, to a life interest, with remainder to his children. It is nothing, that with respect to the other grandchildren it might be void; it cannot be too remote as to such eldest son. The codicil must be so far construed, *reddendo singula singulis*.

Mr. Tinney resumed:—But with regard to the other grandchildren, they must take absolutely, and one of them [*354] was Harriet, who *died without issue and intestate; and Daniel Josias Olivier, as having taken out the administration, is therefore entitled to receive her share; and two of his own children being now dead, he will be also entitled to their respective shares as their administrator and next of kin.

Mr. W. O. Carr followed on the same side:—The 3,000*l.* only was given to Daniel Josias Olivier as the eldest male child living at the testatrix's death. He did not take his share in the 10,000*l.* as such *persona designata* at her death, but under the general description or class of grandchildren. He was entitled, therefore, absolutely to the latter, on the codicil being so far held void for remoteness. But the true effect of the codicil is to give Mr. Daniel Josias Olivier a *quasi estate tail*, and therefore an absolute interest in both funds or shares.

THE MASTER OF THE ROLLS:—How is it possible that the testatrix gives him an absolute interest in the 3,000*l.*, when by the will she gives it to him absolutely, and by her codicil she states she limits the absolute interest so given by her will to a life interest only. I must construe the will and codicil together.

Mr. W. O. Carr resumed:—In the case of *Seale v. Barter*, the court decided the construction on the codicil alone. It is not a question of *intention* that governs the cases cited in support of this construction. To use the words of Lord Hale in giving judgment in the case of *The King v. Melling*,^(a)—“It is pos-

(a) Ventr. 214, 225.

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sible that he did intend but an estate for *life, and it is [*355] by consequence and operation of law only that it becomes an estate tail." The intention drawn from the will and codicil being taken together can but amount to an *express* declaration upon the codicil that he should take "for life and *no longer*," which would make it similar to *Robinson v. Robinson*; and notwithstanding which the court there held that an estate tail was given. And the rule is the same in equity as at law, that however express or clear the interest be intended and limited for life, it will be enlarged by this necessary legal construction, or effect of such subsequent limitations. *Chandler v. Price*,(a) *Mortimer v. West*.(b)

But, should the court decide upon the *intention*, the true construction must still be to give him a *quasi estate tail*, and, therefore, an absolute interest in both funds or shares. For the courts have at least always endeavored to carry into effect the *general* intent, though they sacrifice by so doing the *particular* intent. *Robinson v. Robinson*. The general intent here is to secure the grandchildren and their respective issue the shares bequeathed to their parents; and the particular intent in limiting life estates by the codicil was only in furtherance of this. The limitations over, then, being void as too remote, (except as to the 3,000*l.*, given to my client as the eldest son,) the grandchildren would take only for life under the codicil, and the respective shares might go to the residuary legatee as undisposed of. By construing, however, the effect of the codicil to give a *quasi* estate tail, this general intent is preserved. If it be contended that the codicil is executory, and therefore enables the court to carry the legal intention of the testatrix into effect, as in *Humbertson v. *Humbertson*,(c) the court, in these cases, [*356] adopts or acts upon the doctrine of *cy. pres.*, *Mortimer v. West*,(d) which is inapplicable to personalty. *Fearne*, (8th ed.,) 208; *Routledge v. Dorrell*,(e) *Leake v. Robinson*.(g)

Mr. *Pemberton* for Mrs. Anna Awdry Etough, a granddaughter:

(a) 2 Ves. 99.

(b) Since reported, 2 Simon, 280.

(c) 1 P. W. 332

(d) 2 Sim. 280.

(e) 2 Ves. 357.

(g) 2 Mer. 363.

It is clear that although you may limit to unborn children, you cannot limit upon that. The question is, Whether the codicil is not intended to effect such latter limitation, and therefore void for remoteness? Except the 3,000*l.* given to the eldest male child of the son of the testatrix living at her decease, the other bequests are to the grandchildren generally, under which description or class may be included not only those *in esse* at the time of the testatrix's death, but any born after during their parent's life; and though in this case all the grandchildren were actually born during the testatrix's life, and therefore the limitations over by the codicil to their children, if properly expressed, might have been good, yet, inasmuch as the limitation stands, it might extend to a limitation over to the children of grandchildren unborn in the testatrix's life, it must be void altogether: it cannot be held good as to part, and void as to the rest. *Leake v. Robinson.*

This being so, the limitations in the codicil are void except as to the 3,000*l.* given to the eldest male child of her son living at her death; and as the sole intention of the testatrix, in limiting by her codicil the absolute interests given by her will to the grandchildren to life interests, was but for the purpose [*357] of further securing to *them and their respective issue the full benefit of their respective shares, and the object so intended cannot be legally effected, but is void for remoteness, the court must so far reject the codicil *entirely*, and the grandchildren must take, therefore, absolute interests in their respective shares under the will as if the codicil had never existed, or at least affected their interests. With respect to the 10,000*l.* there is this further question, Whether "issue" extends to more remote issue than the grandchildren, so as to include their children with them in the bequest? I contend that it goes here no further than grandchildren, and then my client will take an absolute interest in her share of the 10,000*l.* also.

Mr. *Skirrow* followed.

Mr. *Treslove* and Mr. *John Boteler* for two others of the chil

dren of Daniel Stephen Olivier, supported Mr. *Pemberton's* argument.

Mr. *Sidebottom* and Mr. *Elderton* for some of the children of grandchildren.

All the children being *in esse* at the time of the testatrix's death, the limitation over to their children by the codicil must be good, though in the limitation the grandchildren are not expressly confined to those *in esse* at the testatrix's death. The case of *Leake v. Robinson* is not in point, as there the testator attempted to limit to his unborn grandchildren, and also to postpone the vesting till *twenty-five*. The courts have never yet decided to restrain these powers of limitation as far as is now contended for, and have already gone far enough.

Mr. *Teed* for the children of Daniel Josias Olivier, urged similar arguments.

*Mr. *West*, Mr. *Rounell*, Mr. *Lowndes* and Mr. *Warry* [*358] for other children.

THE MASTER OF THE ROLLS:—The law is perfectly well settled: there is no difference with respect to a limitation of freehold and personalty. You cannot limit an estate after an estate limited to unborn children, which this testatrix has endeavored to do. The question with respect to the two sums of 3,000*l.* and 3,000*l.* is, has the testatrix confined her words to grandchildren born at the time of her death? The words she has used are these:—"I leave and bequeath 12,000*l.* 3 per cent. reduced annuities, which I have now transferred from the 4 per cent. stocks, the same to be put in trust in the hands of my three executors, to be employed in the following manner: one-half or 6,000*l.* of the said trust, the interest thereof shall be for the use of my son, the Rev. Daniel Stephen Olivier during his life, and shall be duly paid unto him as his property; and at his death one-half, which will be 3,000*l.* stock, shall revert to my said son's eldest male child living at my demise."

As to the 3,000*l.* given to Daniel Josias Olivier as her "son's eldest male child living at my demise," the subsequent limitation in the codicil to him for life, and then to his unborn children, is within the rules of law, and not being void for remoteness, I shall hold it valid. Then, as to the other children, the will says, "the other 3,000*l.* stock shall be divided in equal shares between his other children lawfully begotten." Do not these words include every other grandchild that could be afterwards begotten? There can be no doubt upon it.

She afterwards makes a codicil, by which she desires to limit the interest of her grandchildren to a life estate. Now, [*359] *having already stated that the limitation to the grandchildren includes not only those *in esse* at her death, but every other grandchild afterwards begotten, any limitation to their children must be not within the rules of law, but void for remoteness.

It has been suggested very ingeniously by Mr. *Pemberton*, that as the codicil, with respect to the grandchildren being the children of the sons and daughters of Daniel Stephen Olivier, (other than the eldest son, in respect of one of the sums of 3,000*l.*,) had failed by reason of its giving an interest too remote, that the will, with that exception, is not affected by the codicil, and, consequently, that their interest rests upon the construction of the will only. And I am disposed to think that there is a clear intention that the codicil was only made to let in the great-grandchildren; and as that fails, the intention of the testatrix will be best effected by declaring, that the interest given to those grandchildren by the will is not displaced by the codicil, and, consequently, that they took an absolute interest.

The minutes of the decree are as follow:—Declare that, according to the true construction of the will and codicils of Susannah Olivier, the testatrix, the defendant Daniel Josias Olivier, as the eldest male child of the testatrix's son, the Rev. Daniel Stephen Olivier, living at the testatrix's death, is entitled during his life, and from the death of his said father, Daniel S. Olivier, to

the dividends and interest of 3,000*l.* bank 3 per cent. annuities, part of the 12,000*l.* like annuities in the will of the testatrix mentioned; and after his decease, any person interested in such one-fourth part to be at liberty to apply. Declare that as to the 10,000*l.* bank stock, and all other the legacies and bequests *to the testatrix's grandchildren in the will and [*360] codicil contained, except as to the said 3,000*l.* 3 per cent. reduced annuities, the limitation over to the issue of the testatrix's grandchildren contained in the codicil of the 30th of March, 1801, is void for remoteness; and as to the 10,000*l.* bank stock, the defendant Daniel Josias Olivier, as one of the grandchildren of the testatrix, and the issue of her son, Daniel S. Olivier, is absolutely entitled to a fifth of the third part of the 10,000*l.* bank stock. Declare that Anna Awdry, the wife of the defendant Richard Etough, and the defendants Henry Stephen Olivier, and Mary Arnold Olivier, and Harriet Elizabeth Olivier, deceased, as the four other children of Daniel Stephen Olivier, and as grandchildren of the testatrix, became absolutely entitled to the 3,000*l.* bank 3 per cent. reduced annuities, further part of the 12,000*l.* like annuities, and to four-fifths of the one-third of the 10,000*l.* bank stock in equal shares. Declare that the share and interest of Harriet Elizabeth Olivier is effectually passed by the gift of the said Daniel Stephen Olivier, in his lifetime, to the said Daniel Josias Olivier, in trust for himself and the defendant Henry Stephen Olivier, Mary Arnold Olivier and Anna Awdry Etough. Declare that the defendant William Daniel Conybeare, and the late John Josias Conybeare, deceased, as the children of Margaret Esther Conybeare, and grandchildren of the testatrix, are entitled to one-half part of the 6,000*l.* bank 3 per cent. reduced annuities, being the residue of the 12,000*l.* like annuities, and to one other third part of the 10,000*l.* bank stock in equal shares. Declare that the defendant Dame Julia Elizabeth Congreve, the daughter of the testatrix, is entitled during her life to the dividends and interest of the remaining 3,000*l.* bank 3 per cent. annuities, and of the remaining third part of the 10,000*l.* bank stock. The dividends and interest from time to time to accrue due in *respect of the last mentioned annuities [*361] and bank stock to be from time to time paid to the de-

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fendant Dame Julia Elizabeth Congreve by half-yearly payments during her life; and after her decease, any persons interested therein to be at liberty to apply. The master to be at liberty to state special circumstances, and any of the parties to be at liberty to apply.

Reg. Lib. A. 1829, fol. 1684.

BETWEEN PETER VAWDREY AND DAME HANNAH EVANS, *Plaintiffs*; AND ARCHIBALD PERRIN GEDDES, JOHN HYSLOP, JOHN ARTHUR BARRON, MARY VAWDREY, GILBERT VAWDREY, RICHARD VAWDREY, WILLIAM VAWDREY, THOMAS VAWDREY, SARAH DARELL VAWDREY, AND PETER NICHOLSON, *Defendants*.

Remote Interest.

WESTMINSTER HALL.—1830: 4th February.

A testatrix, by her will, directed that the interest of the residue of her estate should be divided between her four sisters during their natural lives, and on their deaths the interest to be applied in the maintenance or education, or accumulate for the benefit of the children of each of the sisters so dying, until they should severally attain the age of twenty-two, and upon their attaining that age, they were to become entitled to their mother's share of the principal; and in case of the death of either of them under that age leaving issue, such issue to be entitled to their respective parent's share, at such time as the parents would have been entitled thereto, if living.

Held, that the gift to the children of the sisters was too remote.

THE testatrix, Amy Seaman, by her will, dated the 9th of January, 1798, directed that all the produce of the residue of her estate and effects, after paying the legacies, her funeral expenses, and any debts which she might owe, should be placed [*362] out on mortgage or *government security, and the interest, dividends, or produce thereof should be equally divided between her four sisters, for their sole and separate use, and independent of the control or authority of their husbands, during their natural lives; and on the death of her sisters, she declared that the interest of their respective shares should, at the

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discretion of their executrixes, be applied in the maintenance, education, or accumulate for the benefit of the children of each of her sisters so dying, until they should severally attain the age of twenty-two years, and upon any of their attainment to that age, they should be entitled to their proportion of their mother's share of the principal; and in case of any of their decease under that age, leaving lawful issue, such issue should be entitled to their respective parent's share, at such time as such parent would have been entitled, if living, thereto, with the benefit of the interest or produce thereof in the meantime; but in case any such children should die under the said age, without leaving issue, or such issue should die before they were entitled to the principal of their shares, that then the other children of her said sisters should be entitled thereto, together with the issue of any of them who should be then dead, in like manner, and with like benefit of survivorship, as their original shares; but in case all the children of any of her said sisters should die without issue, or there being such issue, they should all die before the principal of their respective shares should become payable, then the share of such of her sisters, whose children should so die, should be paid and applied to and for the benefit of her other sisters and their respective children or issue, in like manner as their original shares; and upon the decease of her sister, Hannah Evans, leaving no issue, she willed that her brother-in-law, William David Evans, should have the interest and produce of her share during his natural life; and that, upon his decease, the same should be *applied to and for the benefit of her other sisters [*368] and their children, in like manner, and with like power of survivorship, as the shares of her other sisters were.

The testatrix died on the 27th of August, 1798, leaving her sisters, Elizabeth, the wife of James Nicholson, (since deceased,) Mary, the wife of Daniel Vawdrey, who was then living, Catherine Perrin, widow, since deceased, and Dame Hannah Evans, then the wife of, and now the widow of, Sir William David Evans, and who is now living, her only next of kin her surviving, the four sisters of the testatrix mentioned in her will.

Elizabeth Nicholson, one of the testatrix's sisters, died on the 2d February, 1810, leaving one child only, the defendant Peter Nicholson, who attained the age of twenty-two years, and procured letters of administration of the effects of his mother, and he thereby became her legal representative.

Catherine Perrin, another of the testatrix's sisters, died on the 5th of February, 1803, leaving one child only, Sarah, the wife of William Geddes, who died on the 5th of July, 1803, of the age of nineteen years, leaving only one child, the defendant A. P. Geddes, who attained the age of twenty-two years; and he having procured letters of administration to the effects of his mother to be granted to him, he thereby became the legal personal representative of the said Sarah Geddes.

Catherine Perrin, by her will, dated 16th May, 1802, appointed William David Evans and Thomas Lyon her executors, both of whom proved the same, and thereby became her legal personal representatives. W. D. Evans survived T. Lyon, and died in December, 1821, having, by his will, appointed the plaintiffs, Peter Vawdrey and *Dame Hannah Evans, his executor and executrix, who duly proved the same, and thereby became the legal personal representatives of the said Catherine Perrin.

The defendant Mary Vawdrey, had six children, who are all living, namely: the defendant Gilbert Vawdrey, then in the fiftieth year of his age; the plaintiff Peter Vawdrey, then in the forty-ninth year of his age; the defendants, Richard Vawdrey, then in the forty-seventh year of his age; William Vawdrey, then in the forty-fifth year of his age; Thomas Vawdrey, then in the forty-third year of his age; and Sarah Darell Vawdrey, then in the fortieth year of her age. The defendant Mary Vawdrey, never had any other children or child.

Dame Hannah Evans never had any children or child.

The master reported that he could find no other next of kin.

Mr. *Duckworth* for the plaintiff.

Mr. *Bickersteth* and Mr. *Koe* for defendant Archibald Perrin Geddes, cited *Leake v. Robinson*,^(a) and *Bull v. Pritchard*.^(b)

Mr. *Pemberton* and Mr. *Simpkinson* for the executors of William Geddes, as the representative of Sarah Geddes. The bequest over after the gift to the issue, after the gift to the children of the sister of the testatrix, is clearly void, and is admitted so to be on all sides. But we say that the gift to the children themselves is absolutely vested, *Hanson v. Graham*,^(c) subject only to be divested on *their dying under twenty-two, which [*365] is a void limitation, and therefore cannot divest the estates.

In the case of *Booth v. Booth*,^(a) there was a gift of the residue to trustees who were to pay interest to two grandnieces till their respective marriages, and then to transfer to them their respective shares. One died unmarried; but the court held that her share had vested in her, and belonged to her executors.

Mr. *Temple* for Mr. Nicholson:—The difficulties of this case may be avoided by holding that the gift is only to such children as were in existence at the time of the testatrix's death; for in that case it would not be contrary to any rule of law that the vesting of the principal be postponed until they arrive at the age of twenty-two, or to any other time during their lives. The difficulties would also be avoided by holding that all the children took vested interests, subjected by the will to be divested by their not attaining twenty-two; which condition could not have any operation, not being confined to children then in existence, so that the children would take an absolute interest.

THE MASTER OF THE ROLLS:—This is a bill filed to take the opinion of the court on the construction of the will of Amy Sea-

(a) 2 Mer. 363.

(b) 1 Russ. 213.

(c) 6 Ves. 239.

(d) 4 Ves. 399.

man. The testatrix has directed the residue of her estate to be invested, and the interest to be divided between her four sisters during their natural lives; and on the death of her sisters, she has declared that the interest of their respective shares [*366] should be applied in the maintenance, *and education, or accumulate for the benefit of the children of each of her sisters so dying, until they should severally attain the age of twenty-two years; and upon any of them attaining that age they should become entitled to their mother's share of the principal; and in case of the decease of any of them under that age, leaving issue, such issue should be entitled to their respective parent's share, at such time as such parent would have been entitled, if living, thereto.

The testatrix gives for life to the four sisters: two of them are dead; and the question is, What is to be done with their shares? One of them left a daughter, who married Geddes, but died under twenty-two, leaving an only child, who has attained twenty-two. The other sister, Mrs. Nicholson, left a son, Peter, who has attained twenty-two. The share of his mother was for some time treated as his; but a doubt having arisen, whether the limitation was not too remote, an opinion was taken, and this suit was instituted.

The authorities cited are extremely nice, and show the difficulties of this case, particularly in distinguishing this case from the case of *Booth v. Booth*, (a) before Lord Alvanley; but it can hardly be distinguished from the case of *Leake v. Robinson*; (b) (his Honor here read the residuary clause of the will in that case;) the time of payment there was to be at the age of twenty-five or marriage. Now this, like the present case, was a residuary bequest; and in *Booth v. Booth*, Lord Alvanley, though not perhaps satisfactorily, thought the court should construe [*367] a residuary gift more favorably than *a general legacy to make the share vest, in order to prevent an intestacy. That distinction would be in favor of this case. The in-

(a) 4 Ves. 399.

(b) 2 Mer. 363.

terest is to be applied to the maintenance of the children until they attain twenty-two, and then they are to be entitled to the principal. There can be no difference whether the age is twenty-two or twenty-five. In *Leake v. Robinson* the share was to vest at twenty-five or marriage; in this case at twenty-two only. This case may, therefore, be said to run on all fours with that of *Leake v. Robinson*. It has been argued that this was vested because maintenance was given; but it has never been held vested where it was given over if the legatee did not attain a certain age. Here the testator has directed that if a child die before he attains twenty-two years, his share shall go over; that repels all presumption of vesting, because simply maintenance is given. There is a different rule with respect to freehold, as in *Boraston's Case*,^(a) and the cases which followed it. But in no case has personal property been held to vest, notwithstanding interest is given to the legatee, where the legacy is given over, and where a certain age is to be attained. On the part of Nicholson, the grandson, it was said by counsel that the words applied to children living at the death of the testator; but that cannot be.

With respect to what has been said about accumulations, the act on that subject was passed in the fortieth year of the late king; and this will having been made in 1798, the act does not apply.

My opinion being that the gifts to the children of the sisters are void, as too remote, the subsequent gifts *are [*368] also too remote, and the shares as they drop in, belong to the next of kin.

The costs to come out of the residue.

See Gilbert on Uses, p. 261, Mr. Sugden's note; *Proctor v. Bishop of Bath and Wells*, 2 H. B. 358; *Cambridge v. Rous*, 8 Ves. 12; *Lade v. Holford*, 3 Burr. 1416; *Blandford v. Thackerell*, 2 Ves. jun. 238; *Taylor v. Biddall*, 2 Mod. 289; *Stephens v. Stephens*, Forrester Cases temp. Talbot, 228.

(a) 3 Co. 19; *Doe v. Lea*, 3 T. R. 41.

BETWEEN THOMAS BAKER AND ANN, HIS WIFE, LATE ANN
CREASE, WIDOW, *Plaintiffs*; AND WILLIAM BENT, *Defendant*.

Reversions.

WESTMINSTER HALL.—1830: 9th February.

A person having a reversionary interest expectant upon the death of R. *without issue*, sells the same. Many years after, a bill is filed to set aside the sale, on the ground of inadequacy of consideration.

Held, that the court will not enter into the value of property on such a contingency. But it appearing that the treaty was entered into on the basis of considering the contingency to be half the value of the reversion, the court directed an inquiry of the real value without reference to the contingency, and directed that that contingency should be rated at one-half the value.

THE plaintiff, Ann Crease, then the wife of Walsingham Crease, being under the will of James Finlayson seised of four equal undivided eleventh parts of a wharf, and two houses in Cannon Row, in Westminster, in the occupation of the defendant or his under tenant, in reversion expectant upon the death of James Roby, without issue male, agreed to sell the same to the defendant for 275*l*.

James Roby was then about sixty-four or sixty-five years of age, and had not any male issue, and was not married.

[*369] *In April, 1818, the plaintiff Ann Crease, and her then intended husband, by lease, release and fine, conveyed this property to the defendant.

James Roby died on the 11th September, 1822, without issue.

The bill stated, that the annual value of the four-elevenths was, at the time of the purchase, and then was, 157*l*.; and that the defendant actually paid that rent for four other eleven parts or shares of the same premises, which he held as tenant to a Mrs. Fearnall, the owner thereof.

The bill charged, that the plaintiff and her husband were, at

the time of the sale, in poverty and distress, and that the defendant was acquainted with it. And also charged that the consideration was grossly inadequate; and the bill prayed, that the agreement and conveyance might be declared fraudulent and void, and be delivered up to be cancelled.

The defendant, by his answer, set forth a letter from Mr. and Mrs. Crease's solicitor, desiring to know whether he would be disposed to treat for the purchase of the reversionary interest on having a clear title; that the parties were determined to endeavor to effect a sale, but previously to a public sale, they wished the defendant to have the option of refusal.

After some time a price was named on behalf of the vendors at 1,200*l.*, for the reversion after the death of the present tenant for life.

The defendant's solicitor offered 550*l.*; but, on the delivery of the abstract of title, it was found that the vendors had not an absolute reversion expectant on the *death of [*370] James Roby, but a contingent reversion expectant not only upon his death, but on his dying without issue, and on Elizabeth Roby dying without issue. She was then fifty-eight, and had never been married. She died in 1821. James Roby died in 1822. The defendant ultimately offered 275*l.*, which was accepted.

The defendant admitted, that as tenant to the trustees of Mr. Fearnall, of four other eleven parts or shares of the same premises, he paid them the annual rent or sum of 152*l.* 15*s.*; but defendant believed that no new tenant for the entirety of the premises would give 420*l.* 1*s.* 3*d.*, being after the same rate as defendant so paid to the trustees of Mrs. Fearnall for their four elevenths.

No replication having been filed, this cause came on to be heard on bill and answer.

The effect of the evidence is stated in his Honor's judgment.

The value of the reversionary interest estimated by Mr. Morgan, supposing the rent to be 420*l.*, was 2,592*l.*; but in this the contingency of issue was not taken into computation, and he would not take upon himself to say what deductions should be made on that account.

The evidence of the defendant by two surveyors was, that from 270*l.* to 300*l.* was the value of the four elevenths, under all the circumstances of the contingency

Mr. *Pemberton* for the plaintiffs:—This bill is filed to set aside a sale of land, that interest being reversionary. The plaintiff Anne, in the year 1816, was the wife of Walsingham Crease, an attorney's clerk, and he was living in a garret.

[*371] *The plaintiff Mrs. Baker, then Mrs. Crease, was entitled to four elevenths in reversion of James Roby, and the interest was liable to be reduced by him or Elizabeth Roby having issue: he was sixty-three, and she was fifty-eight. The first point is as to the value; and if the purchaser of a reversion fails to show that he has paid the full value, the court will set the sale aside: this was decided by Sir William Grant, and has been recently acted upon by your Honor.^(a) There was also misrepresentation; for it being held at half the yearly rent it was worth, Mr. Bent even represented that rent to be less than it actually was. I shall prove, that though he represented the rent to be 70*l.* for these four-elevenths, he paid 85*l.*; and it is in proof that he paid for another four-elevenths 157*l.* rent.

Immediately after the existing contract was determined by the death of the tenant for life, the rent was raised to 157*l.*

I will first call the attention of the court to the evidence of Mr. Morgan; and the court will see it is clear that the plaintiff did not receive one third part of the value of the property sold.

He values at 2,592*l.*, the entirety at a rent of 420*l.*; but he did

(a) And see *Hilliard v. Gambel*, *infra*, note.

not take into consideration the contingencies. Now the defendant, in his answer, says, that the value of the contingencies is one-half; and the court will then deduct one-half, and the remainder will be about 1,300*l.* But let the rent be taken at 210*l.* only, instead of 420*l.*, there would then be a remainder of 700*l.*

The witnesses on the part of the defendant do not give the least notion of the grounds on which they make their valuation

*Under these circumstances, it is shown that a purchase has been made by the defendant at a price much under the value; it is clear that he purchased by misrepresentation. Admitting there was no knowledge in the defendant of the distressed circumstances, it is perfectly clear that the defendant has not given the value of the four eleven parts, the contingencies of one of sixty-three and the other of fifty-nine having issue amount to nothing. It is incumbent upon the purchaser of a reversion, even without any fraud, to show that he has given the full price: this is the doctrine of the court. [*372]

Mr. *Moore* followed, also for the plaintiffs.

Mr. *Bickersteth* and Mr. *Beames* for the defendant:—There never was a case more free from fraud and surprise: the vendors went to the defendant; and so far was he from being anxious to purchase the property, that he refused so to do. They then employed their solicitor, Mr. *Baker*, who entered into a treaty with the solicitor of Mr. *Bent*. There is no evidence of Mr. *Bent* being acquainted with any distress, except that Mr. *Baker* once said his clients were poor. It was in treaty and negotiation from 1816 to 1818; fraud and surprise are therefore out of the question. The real rent had been previously communicated to the plaintiff; 70*l.* was considered a permanent rent.

(In answer to a question put by his Honor, he was informed that the answer to a bill filed by Mr. and Mrs. *Crease* against the executor of the person under whose will they took the property, and in which the actual rent appeared to be 85*l.* was filed in 1814.)

Mr. *Bickersteth*.—There is nothing like misrepresentation; and the bill must be dismissed with costs.

[*373] *Mr. *Pemberton* cited a case, where a reference had been made to the master, who reported a value of 600*l.*, deducting 115*l.* for the contingency of issue. It was argued here and before the Chancellor.

THE MASTER OF THE ROLLS:—I have no recollection of it. Can the plaintiff establish, that the calculations proceeded upon a less rent than they ought to have done? One man at sixty-three may marry in a year; another man, with other dispositions, might not do so. How is it possible to make any computation of the value of such contingencies?

Mr. *Pemberton* in reply:—I have already stated a case which was argued before your Honor when Vice-Chancellor: the contingency was the death of a person of the name of *Newton*, without issue male. He was married. [MASTER OF THE ROLLS:—What age was his wife?] That did not appear. In that case a reference was made to the master to report the value, and the Lord Chancellor confirmed your Honor's decree; but it does appear to me that the court is not embarrassed with that difficulty. We have here Mr. *Bent* dealing for this, and he well knew Mr. *Roby*. He had illegitimate issue; and therefore there was the less chance of his marrying. Mr. *Bent* offered to become the purchaser, allowing one-half for the contingency: this is according to his own statement. Therefore take the value, and deduct one-half for the value of the contingency; and yet we find that he has not paid more than one-third of the value of the property: then the actual rent was not half the value. It is sufficient for me to show that the treaty proceeded on a mistake. It is said we knew the value; but in the sale of a reversion it is for the purchaser to make out that he has given the full value: that was decided by Sir William Grant. This is a reversion purchased at less than the value, and therefore the purchase cannot stand.

*THE MASTER OF THE ROLLS:—Had this case turned [*374] upon the question whether a proper value had been given for a contingency, I should have dismissed it with costs; for how can a value be put upon the contingency of a man's marrying and leaving issue? But if a treaty proceed upon a notion that the annual value is less than it really is, it would be plain that less than the value was given. Was the calculation in this case made upon a less rent than was actually paid? Now the calculation here was made upon an annual rental of 70*l.*; and Mr. Nelson, the defendant's solicitor, in his letter so stated it: whereas the truth is, it appears, that the rent was 80*l.* 10*s.* There is reason to suppose that the calculation did not proceed upon the real value. In 1822, on the death of the tenant for life, a lease was granted at 420*l.*, which for the four-elevenths was 152*l.* per annum. It is then said, that this price was given for the local advantages; but I concur with Mr. *Pemberton*, that it is incumbent on the defendant to prove the value. This has been long acted upon.

I am therefore disposed to send an inquiry to the master, What was the value in 1817, when the contract was entered into? But how can you value the contingency? It appears, as has been stated by Mr. *Pemberton*, that these parties have considered this contingency as of the value of one-half of the property, and concluded the treaty on that basis. Misrepresentation is not charged in the bill. Upon the whole, I think the justice of this case will be best answered by directing an inquiry what was the actual value of the reversion of four-elevenths of that property at the time of the treaty, without respect to the contingency.

This certainly is not a case to be favored; for it is not until 1828 that the bill is filed. If the price given shall appear to be not one-half of the value at the time I shall declare the purchase void, but without costs. I *cannot give [*375] costs; the tenant for life having lived five years after the agreement, and six years having elapsed from his death until the bill was filed.

 1830.—M'Nab v. Mensal.

Declare, as between these parties, this contingency is to be considered as of the value of one-half of the reversion.

Let an inquiry be directed what was the value of the reversion at the time of the agreement, without reference to the contingencies.

No costs given up to the hearing.

Reserve further directions and costs.

Reg. Lib. A. 1829, fol. 2385.

HILLIARD v. GAMBEL.

1829: 22d July.

This was a bill filed in 1826, to make void a sale of a reversion made in 1806; it was proved that the price was inadequate. It was held that in a suit to make void the sale of a reversion, it was not necessary to prove fraud or surprise; inadequacy consideration being alone sufficient, by the decided cases, to authorize the court to make void the sale and treat the purchaser of a reversion only as a mortgagee: that is, that the vendor, paying the purchaser his principal, interest and costs, is entitled to a reconveyance.

Reg. Lib. A. 1828, fol. 2657.

M'NAB v. MENSAL.

Practice

1830: Thursday, 11th February.

IN this case Mr. *Bagshawe*, the counsel for a subsequent incumbrancer, asked to be dismissed, being satisfied she would never get anything, and undertaking to join in any conveyance she might be called upon to execute.

THE MASTER OF THE ROLLS said that she ought to have disclaimed on her answer. She must remain a party.

1830.—Rofe v. Sowerby.

*DOVER v. EVERARD.

[*376]

Executor.—Practice.—Costs.

1830: Thursday, 11th February.

A person appointed with another executor, and who disclaims, but who does some acts as a friend of the family, is not to be considered to have acted as an executor, and a bill against him as such would be dismissed, with costs.

THE question was as to the responsibility of an executor who had disclaimed. He executed a disclaimer, as he stated in his second answer, on the 23d February; yet it appeared that he did some prior acts.

THE MASTER OF THE ROLLS:—In the absence of circumstances, he would be thought to have acted as executor; but by the evidence he was only acting as agent of the other executor, and as a kind friend of the family, friendly advising them in the disposal of the estate. It is perfectly plain that the defendant never meant to act as executor.

Bill dismissed, as against that executor, with costs.

Account directed against other parties.

ROFE v. SOWERBY.

ROLLS.—1830: 13th February.

The testator directed his personalty to be invested for the sole use and maintenance of his daughter until she arrived at twenty-one; and when she attained twenty-one, the remainder to be paid to the daughter.

She died under twenty-one.

Held, a vested interest.

JOHN ROFE, by his will, bequeathed in the following manner:
“I direct all my just debts, funeral expenses, and the charge of proving this my will, be fully satisfied and paid. I desire that

my furniture and linen may be sold after my decease to be converted into money, together with my funded property and house; likewise 50*l.* which I am entitled to from my club, be [*377] invested *in the hands of my executors for the sole use and maintenance of, bringing up and supporting my dear daughter, Rebecca Warman Rofe, until she arrives at the age of twenty-one; and when she attains the age of twenty-one, to receive the overplus, should there be any remaining from the above funded property, house, and 50*l.* left me by my club, after paying the expenses incurred for the maintenance, support and education of my daughter, Rebecca Warman Rofe, the remainder to be paid into her hands for her sole use and disposal."

Rebecca Warman Rofe died under age, unmarried and intestate, leaving the plaintiff, her only surviving aunt and next of kin.

The testator left three sisters, the plaintiff, and two others who died in the lifetime of Rebecca Warman Rofe; and the question was, whether the bequest was vested in Rebecca Warman Rofe? If it were, the property went to the plaintiff as her surviving aunt and sole next of kin; on the other hand, if it did not pass, it became the property of the plaintiff, in conjunction with the representatives of the two deceased sisters.

THE MASTER OF THE ROLLS:—I am of opinion that this is a vested interest.

Declare that it was vested in R. W. Rofe, the infant; and upon her death, intestate, under twenty-one, went to her next of kin.

Refer it to the master to ascertain who were the next of kin of Rebecca Warman Rofe, at the time of her death.

Reg. Lib. 1829, B. fo. 766.

*BARTON v. TATTERSALL.

[*378]

Insolvent Acts.

ROLLS.—1830: 16th February.

A person who had been twice discharged by the court for the relief of insolvent debtors died possessed of considerable property.

Held, that this court could administer the fund: that first the creditors subsequent to the second insolvency should be paid; then those after the first insolvency; and, lastly, those before the first insolvency.

The Statute of Limitations does not affect the creditors of an insolvent in respect of the time elapsed since his discharge.

PHILLIP JACOBS, on the 14th September, 1814, was discharged from the King's Bench prison, by the commissioners under the act for the relief of insolvent debtors, having previously executed the usual assignment to the provisional assignee. He subsequently resumed his business, and again becoming embarrassed, on the 22d day of February, 1820, he again took the benefit of the act, making the usual assignment to the provisional assignee, and entering into the recognizance required by the act 54 G. III.

He subsequently became possessed of property; and on the 4th of December, 1826, he made his will, and thereby appointed the defendant, Edmund Tattersall, his executor.

The testator died on the 6th of January, 1827; the defendant proved his will, and possessed himself of exchequer bills, long annuities and other property. The plaintiff was the assignee under both insolvencies, and was a creditor under each of them.

The bill stated the preceding facts, and charged that the personal estate of P. Jacobs was more than sufficient to pay in full and discharge all his debts, due at the time of his death, and which were contracted after his discharge as aforesaid; that after payment thereof, a very considerable surplus would remain, and would be applicable, and ought to be applied, in and towards payment of the plaintiff, and the other scheduled creditors of the said P. Jacobs, under his insolvencies as *far [*379]

as the same would extend; and that the plaintiff was entitled to receive such surplus in order to apply the same accordingly. The bill prayed to that effect.

The defendant admitted, by his answer, that there would be a surplus after paying the debts of the testator, contracted subsequently to his discharge under the insolvent debtors' act; and he submitted to act under the direction of the court.

Mr. Pemberton and *Mr. Parker* for the plaintiffs, called the attention of the court to the statutes for relief of insolvent debtors in England: this case is not within the provisions of the Statute of Limitations; that statute bars the remedy, but does not destroy the right. By the acts for the relief of insolvent debtors in England, although the debtor be discharged, yet his goods and chattels are still liable: the Legislature, contemplating that the insolvent might acquire future property, provided for the interest of the creditors upon it; which shows the intention of the Legislature that the Statute of Limitations should not apply. The insolvent died in 1826, possessed of considerable property; and his executor, in his answer, admits that he had more than was sufficient for payment of all his debts: the estate is liable for the debts contracted before the insolvencies, after payment of the debts subsequently contracted.

Mr. Bickersteth and *Mr. Merivale* for the defendants:—The plaintiff is the assignee of both insolvencies; the Insolvent Debtors' Court has refused to put the recognizances in force; the insolvent acts discharge the person and not the estate, so that creditors have the same remedy against the property of the insolvent as if the act had not been made. The insertion of the name of the creditor in the insolvent's schedule, does not [*380] alter the *case, and that is all the insolvent has done: there is, therefore, nothing here to bar the operation of the Statute of Limitations.

Mr. Pemberton:—The assignee of an insolvent is no more barred by an insolvency than the assignee of a bankrupt, who can claim all his property up to the time of his certificate.

THE MASTER OF THE ROLLS:—This is the case of a bill filed by the assignee of an insolvent debtor. All the acts present only the liability of the estate of an insolvent to the payment of the debts from which he has been discharged, after the payment of his subsequent debts. They all present a particular mode, which has not been pursued in the present case; and the question is, whether a court of equity can administer the assets in its own mode? I am of opinion that it can. The insolvent has taken the benefit of the act twice; and the order of the court must be, to pay last the creditors under the first insolvency. I do not consider the lapse of ten years of any importance; for this case is not within the Statute of Limitations.

Declare that after payment of the debts and funeral expenses since the last insolvency, the surplus assets of the testator's estate is applicable to the payment of debts, under the second insolvency, and then in payment of the debts under the first insolvency.

The usual accounts and directions.

Reg. Lib. A. 1829, fol. 1118.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

WATSON AND ANOTHER *v.* REED.

Vendor and Purchaser.—Delay.

ROLLS.—1830: 15th February.

A purchaser having given notice that he would not complete the purchase, and the vendors having delayed to file their bill for specific performance more than twelve months after that notice, the court held that it was an unwarrantable delay, and dismissed the bill with costs.

THE plaintiffs, on the 1st day of June, 1826, contracted to sell some houses to the defendant. The plaintiffs' solicitor delivered an abstract in due time, and in September, 1826, the defendant's solicitor examined it with the title deeds, and on the 21st September, 1826, the defendant's solicitor returned it to the solicitor for the plaintiffs, with inquiries and observations. Some further correspondence passed on the title, and on the 7th April, 1827, the defendant's solicitor wrote to the solicitor of the plaintiffs that, under all the circumstances, the defendant declined to complete the purchase.

On the 20th of April, 1828, and not till then, the plaintiffs filed their bill for specific performance. The defendant, by his answer, submitted that no part of the purchase money, nor any interest thereon from any time, remained due from him on account of the purchase, inasmuch as he insisted that by reason of

 1830.—*Saberton v. Skeels*.

the lapse of time after the notice given by him of the abandonment of the purchase, until the adoption of any proceeding on the *part of the plaintiffs to enforce the said agreement, the plaintiffs must be deemed and considered to have acquiesced in such abandonment, and could not now enforce the performance thereof.

Mr. *Preston* and Mr. *Girdlestone* for the plaintiffs.

Mr. *Hayter* for the defendant.

THE MASTER OF THE ROLLS :—On the 7th of April, 1827, the vendors are informed that the purchaser would not complete the contract, and the vendors take no step until the 20th of April following, more than twelve months; when they file this bill. This is a most unreasonable delay, and the vendor is not entitled to the interference of this court.

Bill dismissed with costs.
Reg. Lib. 1829, B. v. 621.

[*383]

*SABERTON v. SKEELS.

*Husband and Wife.—Wife's Property.—Personal Representatives.
Construction of those Words.*

WESTMINSTER HALL.—1830: 12th June.

A testator having given by his will legacies to his several daughters, directed that 1,000*l.* of the legacy to each of them should be invested in the name of trustees, and the daughter entitled, in trust to pay her the interest, for which her receipt should be sufficient, and it should not be subject to the debts of her husband, and the principal should, after her death, pass and be subject to any will or disposition she might, under her hand and seal, make thereof, and for want thereof should go to her personal representatives.

The plaintiff married, in succession, two of the daughters.

Held, that the words "personal representatives" mean executors and administrators; that the wife took an absolute interest, and that the husband, on her death, became absolutely entitled.

The marriage with the second sister having been solemnized in Scotland, an inquiry was directed whether it had actually taken place.

THOMAS SKEELS, by his will, having directed his trustees to convert his personal estate into money, directed them to pay his debts; secondly, 400*l.* to his wife; thirdly, to pay to his daughter, Elizabeth, the wife of Mr. Joseph Saberton Saberton, of Chateaux, the sum of 1,000*l.* at the end of one year after his decease, to be settled in the same manner, and subject to the same uses, powers and limitations in every respect as were thereafter contained as to the respective sums of 1,000*l.* to be settled on his daughters as was thereafter mentioned; and, fourthly, to pay to each of his daughters, Mary, Harriett, Ann, Joanna and Sarah, and to any child or children which he might have after the making of that his will, or who might be born after his decease, the sum of 2,000*l.* each, to be paid to them as thereafter was mentioned. And as to the said several sums of 2,000*l.*, the testator thereby directed the interest of the share of each of them to be computed from the day of his decease, or as much thereof as might be necessary to be paid and applied for their bringing up, education, or other advancement, until they should respectively attain the age of twenty-one, or, if a daughter, until her marriage, if she marry under twenty-one with the consent and approbation of his said trustees, or the survivors or survivor of them, *or of the executors or administrators of such survivor; [*384] and upon any of them attaining the age of twenty-one years, or upon the marriage of any daughter before that time, with such consent as aforesaid, then he directed, that as to such daughter, the sum of 1,000*l.*, together with the whole accumulations of interest, be paid to such daughter; and that the remaining 1,000*l.* to each be settled as thereafter mentioned; and as to the said several sums of 1,000*l.* so to be settled, he did thereby direct that each sum of 1,000*l.* so belonging to each be invested in the funds in the names of his said trustees, and the daughter entitled to the same, or should, in the same names, be put out on real security, the interest thereof to be paid to his daughter entitled to the same, for which her receipt alone should be sufficient, and which should not be subject to the debts or control of any husband she might have, and should, after her death, pass and be subject, according to any will or disposition she might, under her hand or seal, make thereof, and for want thereof, should go

to her personal representatives; and if the daughter so entitled to the 1,000*l.* should at any time choose to sink the same, or any part thereof, in the purchase of one or more annuities for her own life, in like manner payable to her sole use, and not subject to the debts of her husband, his said trustees, together with such daughters, were thereby authorized and required to invest the same accordingly on government or good real security, but not otherwise. The plaintiff married two of the daughters, Elizabeth and Harriett: they are both dead. Elizabeth left three children. Neither of those daughters made any will or disposition of the funds, and the plaintiff took out letters of administration to the effects of each of them.

Mr. *Tinney* and Mr. *Preston* for the plaintiffs.

[*385] *Mr. *Tinney*:—The question is, whether the husband is not entitled to the portions of the two sisters whom he married in succession, those sisters having died without making any appointment, and the husband having survived them? In the case of *Price v. Strange*,^(a) the testator directed the money arising from the sale of his real estates to be divided amongst such of his children as should be then living, and the legal representative or representatives of him, her, or them, as should be then dead; and your Honor there said, that the ordinary sense of legal representatives is executors or administrators, and that the children took a vested interest. The cases of *Evans v. Charles*,^(b) and *Bridge v. Abbott*,^(c) were cited; in the former, a testatrix directed, that if a legatee died in her lifetime the legacy should be paid to her personal representatives, and the court held that her administrator took beneficially. The words “personal representatives” are words of limitation,—in some cases there has been a difference of phrase,—but here we have the term “personal representatives,” which is as definite with regard to chattels as “heirs” is to land. There are two other cases in which

(a) 6 *Mad.* 330.

(b) 1 *Anstr.* 128.

(c) 3 *Mad.* 224.

1830.—*Saberton v. Skeels*.

the point was adverted to,—*Anderton v. Dawson*,^(a) *Bayley v. Wright*.^(b)

I submit that the testator has done no more in the events that have happened than to give a vested interest.

Mr. *Preston*.:—The words are, “personal representatives,” not “next of kin,” which is a most important distinction. Words must be construed in their genuine sense, unless a different construction can be put upon *them by the context [*386] of the instrument. Was it ever decided that “personal representatives” meant next of kin? When next of kin take as purchasers, you must not look at the statute, but the kindred; so that if there were a child, and ten children of a deceased child, the living child alone would take, and persons of a different degree of relationship would be excluded.

Your Honor's attention has been already called to this in the case of *Price v. Strange*, and we invite your Honor to come to the same conclusion. What is the difference between personal representatives and executors and administrators? Can next of kin be said to be personal representatives? Would next of kin be liable to debts? They may be claimants. In my judgment, the purposes of justice will be best served by holding that the words “personal representatives” are the same as executors and administrators. I also admit, that executors and administrators will take in the characters of executors and administrators, and for the purposes of distribution. It was so defined by Lord Eldon in the case of *Wellman v. Bowring*,^(c) the case of a surrender of a copyhold to two persons upon certain trusts, and ultimately upon trust to surrender to the use of the executors or administrators of B.: the wife of B. was his administratrix, and she took the fee; but she took it in her character and clothed with her duties of administratrix, and distributable as if personal estate, to be applied in a due course of administration.^(d)

(a) 15 Ves. jun. 542.

(b) 18 Ves. 49.

(c) Sim. & Stew. 24, and 2 Russell, 374.

(d) The reports cited do not go this extent, but this case of *Wellman v. Bowring* came on to be heard upon further directions on the 1st February, 1830, before the

[*387 *The plaintiff, being administrator of each of his wives, will also be entitled, if the court should hold him to take as a purchaser.

Mr. *Lynch*.:—I appear for the three children of Elizabeth. This case is quite different from the case of *Price v. Strange*. I admit the general rule, but there is that in the will which will exclude the husband. The testator gives it to Elizabeth for life to the exclusion of her husband, and does not give him any interest. The wife, by the will, has the power to sink it in the purchase of annuities for her own life with the consent of the trustees, and without the privity of the husband, and those annuities are also to be held for the separate uses of the wife. Is it not reasonable, therefore, to conclude that the testator meant to exclude the husband except by the execution of the power in the wife? she has not executed it, and the husband is therefore excluded. There is as much in the case before the court to exclude the administrator as in the case of *Long v. Blackall*(a) to exclude the wife. In *Price v. Strange*, the gift to the legal representative immediately followed the bequest to the child, here a power intervenes. The case of *Bayley v. Wright*,(b) is also in favor of my proposition. In the case of *Garrett v. Lord Camden*,(c) Lord Eldon held that the widow is not one of the next of kin; the husband here cannot take as next of kin; and a husband cannot take as sole next of kin; the intention was to exclude the husband. By the case of *Ripley v. Waterworth*,(d) the executor could only take in that character, and as trustee for the residuary legatees. On the same principle my clients are entitled. He may take it, so as he let my clients have it again.

[*388 *THE MASTER OF THE ROLLS:—The court should not be influenced by the doubtful construction of detached

Vice-Chancellor, when it was decided that the administratrix took the equitable fee as part of the personal estate, for the benefit of herself and the next of kin, according to the statute for distribution of intestate's estates. Reg. Lib. 1829, B. p. 1439.

(a) 2 Ves. jun. 494.

(b) *Ante*.

(c) 14 Ves. 372.

(d) 7 Ves. 425, 442.

sentences, but proceed upon some settled principle. The words "personal representatives," if taken in the ordinary sense, would be "executors and administrators." The wife would take an absolute interest, and the husband be entitled to administration; he did administer, and became, therefore, the personal representative.⁽¹⁾

(1) In construing wills, technical words are to be taken in their technical sense, unless a plain intention appear to the contrary. *Keen v. Hoffecker*, 2 Harr. Rep. 103; *Vide* 3 Term Rep. 493; *Douglass*, 341; 1 Yates, 343; 5 Vezey, 401, 402; *Ball & Beatt*, 204; 11 Wend. 279, 293. Whenever the devise is to children and grandchildren, or to brothers and sisters, and nephews and nieces, to be equally divided between them, and the devisees are individually named, they take *per capita* and not *per stirpes*. *Ib.* The words equally to be divided, when used in a will, mean a division *per capita* and not *per stirpes*, whether the devisees be children and grandchildren, brothers or sisters, and nephews and nieces, or strangers in blood to the testator. *Ib.* The general rule is, that a will, as to the land, speaks at the date of it; and as to personal estate at the time of testator's death. *Smith v. Edrington*, 8 Cranch, 66; *Allen v. Harrison*, 3 Call, 289. In the construction of wills, the first object is to gather the intention of the testator from the whole will; and this intention must prevail unless it violate some rule of law. *Land v. Olley*, 4 Randolph, 213; *Calloway v. Langhorne*, *Ib.* 181; *Berry v. Headlington*, 3 J. J. Marsh. 321; *Covenhoven v. Shuler*, 2 Paige, 122; *Reno's ex'rs v. Davis*, 4 Hen. & Munf. 283. Where there are repugnant clauses in a will, the latter shall prevail. But repugnance in different clauses of the will, shall not be made out by the technical meaning of terms. For where a consistent intention appears in the context, it must prevail; and it shall be supposed the testator employed the words whose strict signification would make a repugnance, in an improper sense. *Adie v. Cornwell*, 3 Monroe, 279. In the construction of wills, ambiguities are latent or patent. The former exists when the intention of the testator is dubious; the latter exists where the intention is certain, but the object on which the intention is to act is uncertain. In explaining a patent ambiguity, the will alone is to be resorted to; while in the latent class, evidence *dehors* the will may be called in aid of the will. *Breckenridge v. Duncan*, 2 A. K. Marsh. 51. Terms usual, in a will drawn evidently by an unskilful man, shall be scanned by their popular, not their technical meaning. *Harper et al. v. Wilson*, *Ib.* 466. If two parts of a will are irreconcilable with each other, the last part is generally to be taken as evidence of the latest intention of the testator. But this rule is only applied to those cases where the two provisions are totally inconsistent with each other, and where the real intention of the testator cannot be ascertained. *Covenhoven v. Shuler*, 2 Paige, 122. Where the intention of the testator is incorrectly expressed, the court will carry it into effect, by supplying the proper words. *Ib.* The words of a will may be transposed in order to make a limitation sensible, or to effectuate the general intent of the testator. *Ib.* Devises by implication are sustainable only upon the principle of carrying into effect the intention of the testator; and unless it appear upon an examination of the whole will,

Is there anything in this will to control the plain ordinary sense of personal representatives

that such must have been his intention, there is no devise by implication. *Rathbone v. Dyckman*, 3 Paige, 9. An implication may be rebutted by a contrary implication which is equally as strong. *Ib.* The clear literal interpretation of words in a will, may be departed from, if they will bear another construction, where other parts of the will manifest a different intention. *Ib.* The strict grammatical sense of words in a will may be rejected, to carry into effect the intent of the testator. *Ib.* One name may be substituted for another, in the construction of a will, where it is manifest, not only that the name used was not intended, but that a certain other name was necessarily intended. *Connolly v. Pardon*, 1 Paige, 291. Where it is clear, from the intention of the testator, that the word "or" is used instead of "and," and *e converso*, the court interposes to change the word. *O'Brien v. Heaney*, 2 Edwards, 242. Where there is a plain and positive devise, the court will not raise an implied trust in executors, to favor a particular devisee. *Hart v. Ex'rs of Hart*, 2 Desau. 57. The court construed "her," into "their," to give effect to the intent of the testator. *Keith v. Perry*, 2 Desau. 353. In *Bradford and Wife v. Heyward*, (2 Desau. 18,) the word "heirs" was construed children, to effect the testator's obvious intention. Grandchildren may claim a devise, under the description of children, where there are no children. *Ewing's heirs v. Handley's ex'rs*, 4 Litt. 349. Where a testator having both freehold and leasehold lands in a particular place, a devise by him of all the lands in that place, only the freehold lands pass. *Ex'rs of Aylett v. Aylett*, 1 Wash. 800. Where words in a will, which would give an estate tail in real property, would carry the absolute interest in personal property. *Cudworth and Wife v. Hall's adm'r*, 3 Desau. 258; *Bailey v. Davis*, 2 Hawks, 108. The term "children," is usually taken as a word of purchase, unless there be expressions in the will to show the testator intended to use the word as a word of limitation. *Matter of Sanders*, 4 Paige, 293. The disjunctive word "or" construed "and." *Turner v. Whitted*, 2 Hawks, 613; *Briton and Wife v. Johnson*, 2 Hill, 430. Construction of the word "appurtenances" in a will. *Helm v. Grey*, 2 Murphy, 341. In construing a will, the court will look to the state of the testators' family, and to the kind and extent of property he owned, at the time of making the will. *Eden et al. v. Williams' ex'r*, 3 Murphy, 27. Construction of the term "dying without issue." *Brashear v. Macey*, 3 J. J. Marsh. 91. The court will correct a mistake in a will, describing a line bounding the estate devised. *Kenny v. Kenny*, 3 Litt. 302. Surplus land devised in the original will, held not to be included in the expressions "all other lands," and "estate not particularly pointed out," used in the codicil. *Hickman v. Holliday*, 6 Monroe, 586. Wills must be construed liberally, so that the intention of the testator may take effect. *Sams v. Mathews*, (1 Desau. 131,) and the whole will must be taken together. *Ib.* So a will and codicil are to be taken and construed together, as parts of one and the same instrument. *Westcott v. Cady*, 5 Johns. Ch. Rep. 343. And where there are two inconsistent bequests of the same property in the same will, the second revokes the first. *Fraser v. Boone*, 1 Hill, 367. Crops growing at the time of the testator's death, do not pass under the word "appurtenances." *Shelton v. Shelton*, 1 Wash. 53. The term "land," in a bequest, will be considered

1830.—*Saberton v. Skeels*.

It is said that the child had the power to purchase an annuity; but that shows an intention that she should take an absolute interest.

as synonymous with "give," unless it is manifest that the testator did not intend the legal estate to pass to the legatees. *Hinson v. Pickett*, 1 Hill, 38. Construction of the term "dying without issue." *Brown v. Brown*, 1 Dana, 41. And of the term "residue" in a will. *Bradford v. Heyward*, 2 Desau. 32. Construction of the term "families" in a will. *Pringle v. McPherson*, 2 Desau. 524. Plate used in a family passes under a devise or conveyance of "household goods and furniture." *Bunn v. Winthrop*, 1 Johns. Ch. Rep. 339. Construction of the term "all his estate" in a devise. *Cruger v. Heyward*, 2 Desau. 422. The word "increase," in a bequest of a female slave is ambiguous. *Reno's Executors v. Davis*, 4 Hen. & Munf. 283; see *Bryson v. Nicholls et al.*, 2 Hill, 114. Construction of the term "without issue" in a will. *Newton v. Griffith*, 1 Harr. & Gil. 111. It is a general rule, in the construction of wills, that the testator must be presumed to have used words in their ordinary and primary sense, unless it appears from the context that he probably used them in some other sense. *Moffat v. Carrow*, 7 Paige, 328. The word "children," in its ordinary sense, does not include grandchildren, but it may include them when it appears there were no persons who would answer to the description of children in the primary sense of the term. *Ib.* When heirs take by purchase they do not take as heirs, but as a class of persons to whom, by that means, the testator has selected to devise his property; and, as they take in their own right, the distribution is to be made *per capita*, and not *per stirpes*. *Campbell v. Wiggins*, 1 Rice's Eq. Rep. 10. The testator devised as follows: "I lend to my daughter, Nancy Gray, and Robert Gray, her husband, for their lives, one negro man named Peter, and one negro called Little Frank, and one negro woman called Sary, with all her increase, and one feather bed and furniture, for their lives, and then be equally divided among their children." Held, that the children of Robert and Nancy Gray took under the will a vested interest, transmissible to their legal representatives. *Donald v. McCord*, 1 Rice's Eq. Rep. 330. Under a bequest of a particular female slave, by name, with all her increase, the children of the slave born before the making of the will do not pass. *Seibles v. Whalley*, 2 Hill, 603; *Donald v. McCord*, 1 Rice's Eq. Rep. Construction of the word "plantation" in a devise. *Nash v. Savage et al.*, 2 Hill, 50. Construction of the term "residue of all my estate." *Williams v. Williams*, 10 Yerger, 20. In the construction of a will, the court, in endeavoring to arrive at a knowledge of the testator's intention, must take into consideration the circumstances as they existed at the time the will was made. *Hoover's Lessee v. Gregory and Wife*, 10 Yerger, 444. When a bequest in a will is not clothed in language having a particular technical meaning affixed thereto, so as to control the intention in its construction, the intention shall prevail. *Loring et al. v. Hunter*, 9 Yerger, 4. Every will shall be so construed that it shall rather stand than fall, if such construction can reasonably be put upon it. *Davis' Heirs v. Taul and Wife*, 6 Dana, 53. Bequests of personalty are generally construed according to the principles of the civil law. *Wood's Administrator v. Harod's Administrator*, 6 Dana, 343. The words "movable property," in a will, have no technical import; they mean in a will, as in ordinary

I am of opinion that there is nothing in the will to control the ordinary sense of the words "personal representatives."

I shall declare the husband entitled to the portion of the first wife.

With respect to the portion of the second wife, I shall declare it to be a part of her personal estate, and I shall direct an inquiry whether he was legally married to her.

A marriage to the sister of a deceased wife is voidable, and if not made void during her life, it cannot be made void afterwards.

I would declare that the two daughters were absolutely entitled, and that the husband, as administrator of his wife Elizabeth, should have her share, and there should be an inquiry whether he was legally married to *the second sister. [*389] As to that there can be but little doubt, the marriage having taken place in Scotland,—and so little there constitutes a marriage.

If the husband does not establish his title as husband to the second wife, he will not be entitled to all the costs, but if he does he will be entitled to them.

use, something substantive, which has locality, and may move or be moved; they embrace money and bonds for money, but not a debt merely as such. *Ib.* A bequest by an officer, in these words, "all my stock and movable property," does not embrace his claim for half pay. *Ib.* A latent ambiguity, as to the subject matter of a will, may be explained by extraneous evidence. *Overton's Heirs v. Woolfolk et al.*, 6 Dana, 376. Construction of "vested remainders." *Bowling's Heirs v. Dabney's Administrators*, 5 Dana, 434. The heir being favored by law, there should be no strained construction to work a disinheritance where the words are ambiguous. *Deakins v. Hollis*, 7 Gill & Johns. 311. Where the intention of the testator is ascertained, a word manifestly omitted by mistake may be inserted, but no word may be added to defeat the apparent intention of the testator. *Ib.* The terms used in a will are, in general, to be understood according to their popular import, but, where it appears from the will itself that the testator understood the technical import of the terms he employed, and evidently used them in some parts of the will in their technical sense, they should be so understood wherever occurring in the same clause. *Hazelrig v. Hazelrig's Executors*, 3 Dana, 48.

1831.—Platt v. M'Dougall.

Decree that the plaintiff, as the personal representative of his wife Elizabeth, is entitled to the legacy of 1,000*l.* and interest at four per cent., to be calculated from the end of one year from the death of the testator.

Decree that the master inquire whether Harriett was at the time of her death married to the plaintiff, and if that inquiry be waived, then that payment be made to the plaintiff as the personal representative of Harriett, of what shall be found to be due in respect of the legacy of 2,000*l.* and interest so given and bequeathed to her.

Reg. Lib. 1829, B. p. 2300.

*BETWEEN JAMES PLATT, *Plaintiff*; AND JOHN [*390]
M'DOUGALL AND JAMES M'DOUGALL, *Defendants*.

Husband and Wife.—Wife's Property.—Costs.

ROLLS.—1831: 15th February.

On a marriage, the father of the wife purchased 1,000*l.* consols, and the same was vested in trustees, to pay the dividends to the wife for her life; and then trusts were declared for the children of the marriage, under which the court had decreed, in a former suit, that the only child of the marriage, a daughter, took a vested interest.

This daughter married J. M., and died in the lifetime of the mother, leaving J. M. her surviving.

J. M. did not take out administration to the effects of his deceased wife, and afterwards died.

Held, that his executors were entitled to the 1,000*l.* consols, and that the representatives of the wife were not entitled.

One of J. M.'s executors, who was a defendant, having colluded with the other defendant, the court gave costs against both of them.

By indenture bearing date the 15th day of March, 1760, being the settlement made previous to the marriage of Josiah Purdew and Isabella Wigglesworth; it is witnessed, that the sum of 1,000*l.* 3 per cent. consols therein recited to have been purchased by the father of the lady as her marriage portion, and invested

in the names of T. Wilson and C. Wigglesworth, was so purchased and invested in trust after the marriage, that the trustees should pay unto and permit the wife to receive and take the dividends during her life for her sole and separate use; and in case the husband should die in the lifetime of the wife, then from and after her decease in trust for the children of the marriage as therein mentioned, and in some events in trust to transfer the 1,000*l.* and dividends in arrear unto the wife for her own absolute use and benefit. The trusts for the children, and the events on which the trust for the wife depended, were expressed in ambiguous terms, but the effect of them was determined in a former suit, which will be presently stated. The husband died [*391] in March, 1792, in *the lifetime of the wife, and leaving a daughter, Sarah Purdew, the only issue of the marriage.

This daughter married Admiral John M'Dougall, and died in April, 1802, in the lifetime of her mother, and leaving her husband her surviving.

Admiral M'Dougall did not take out letters of administration to his wife, and died in November, 1814, having by his will appointed Mary, his second wife, during her widowhood, and James M'Dougall, surgeon, and the plaintiff, executors, who duly proved the will. Mary, the widow, afterwards married Mr. De Beauvoir.

Isabella Purdew died in September, 1822, having appointed Wm. Masson and Thomas Masson her executors, who duly proved her will.

John M'Dougall, the son of the admiral, by Sarah, his wife, on the 16th of January, 1823, took out administration to the effects of his mother.

In January, 1823, the executors of Isabella Purdew, exhibited their bill against the then trustees of the fund, Mary M'Dougall, widow, and the plaintiff and defendants to the present suit, sta-

ting that, by the death of Sarah M'Dougall in the lifetime of Isabella Purdew, they were, as the personal representatives of the latter, entitled to the 1,000*l.* and dividends discharged from the trusts of the settlement; but it was decreed (see Reg. Lib. 1824, B. p. 2038, April, 1825) that Sarah M'Dougall, the daughter of Isabella Purdew, took a vested interest in the 1,000*l.*; and it was decreed that after payment of costs, the residue of the 1,000*l.* and dividends should be transferred to John M'Dougall, the personal representative of Sarah M'Dougall, and it was so transferred.

*On the 29th of April, 1829, the plaintiff filed the bill [*392] in this cause claiming the residue which had been transferred to John M'Dougall, and that this sum in fact belonged to James M'Dougall and plaintiff as the legal personal representatives of Admiral M'Dougall, and that John M'Dougall was a mere trustee for James M'Dougall and the plaintiff.

The defendant, James M'Dougall, by his answer, said he did not admit that he and plaintiff ever were entitled to it as the personal representatives of the admiral, or that the same was a part of his personal estate, or that the other defendant was a mere trustee for this defendant and plaintiff as such personal representatives; but submitted the same as a question of law to the consideration of the court. He admitted application by the plaintiff to join in the suit, but added that he had refused to join and concur, not conceiving it a proper or necessary suit.

John M'Dougall, by his answer, denied the plaintiff's interest.

Mr. *Pemberton* and Mr. *O. Anderdon*, for John M'Dougall, the administrator of his mother:—A husband is entitled to his wife's property only in the character of administrator; and had Admiral M'Dougall taken out letters of administration to his deceased wife he might have received the money, subject to the payment of debts; but he did not do so, and the plaintiff, his personal representative, is not entitled. John M'Dougall is in the situation of a trustee, and is at all events entitled to his costs.

1830.—Attorney-General v. Christ's Hospital.

Mr. *Swanston* for Mr. James M'Dougall, asked for costs.

[*393] *The MASTER OF THE ROLLS decreed, that the defendant John M'Dougall, should transfer the stock to plaintiff and defendant James M'Dougall, as executors of Admiral M'Dougall; and his Honor being of opinion that the defendants had combined in the defence, and that the transfer ought to have been made without suit, gave costs against both of them.

Reg. Lib. 1830, B. p. 913.

THE ATTORNEY-GENERAL, AT THE RELATION OF THE PRESIDENT AND GOVERNORS OF THE HOSPITAL FOUNDED AT THE COSTS AND CHARGES OF THOMAS GUY, ESQUIRE, v. THE GOVERNORS OF CHRIST'S HOSPITAL.

Gift upon Condition to a Charity.—Acceptance.

WESTMINSTER HALL.—1830: 22d June.

In 1724 a testator gave 400*l.* per annum to the governors of Christ's Hospital, upon condition that they received four boys or girls annually, to be nominated by the relators. They received the income and the nominees until 1827, when they passed a resolution that they would no longer receive them.

Held, that this was a gift upon condition, and, having accepted the gift, they were bound to the condition.

THOMAS GUY, by his will, dated 4th September, 1724, gave and devised as follows:—

"Item, I give to the president and governors of Christ's Hospital, in London, and their successors forever, one annuity or yearly sum of 400*l.*, to be paid by my said executors till such intended corporation (alluding to a charter of incorporation for Guy's Hospital) shall be obtained and take effect, and then by such intended corporation, or their treasurer for the time being; provided nevertheless, and upon this condition, that my

[*394] said executors and such intended corporation, and *their successors, shall have liberty from time to time to nomi-

nate and put into Christ's Hospital aforesaid yearly and every year forever at Easter, or within six months after, such four poor boys or girls, whether orphans or otherwise, or the children of freemen of the city of London, or unfreemen not less than seven, or more than ten years of age, as my said executors or the said intended corporation, and their successors, shall think fit, with preference to my relations as often as any such shall offer themselves, who shall be received into the said hospital, and have the maintenance and education thereof, and be continued therein in like manner as other children are maintained and educated in the said hospital; and my will is in that case, and as often as the said president and governors of Christ's Hospital shall neglect or refuse to take in the said number of boys and girls to them nominated and qualified as aforesaid, it shall be lawful for my said executors and the said intended corporation, and they are hereby directed and desired, to apply the said annual sum of 400*l.* to the education and maintenance of such four poor children as aforesaid in such other school or place, and in such other manner, as they shall think fit."

From the death of the testator the governors of Christ's Hospital received the annuity and four boys annually until 1827, when they passed a resolution that they would do so no longer.

Mr. *Pemberton* and Mr. *Wigram* for the relators:—The question is, whether the governors of Christ's Hospital having accepted an annuity of 400*l.* a year given by the will of Guy, they are not now bound by the acceptance and to the conditions which accompanied the gift?

*The governors of Christ's Hospital have power to [*395] accept gifts of this description, and that is not now in dispute between us. They say they were to be at liberty under a clause in the will to renounce the bequest; but the construction we put upon it is consistent with the plain intention. An authority is given to the executors, but still holding Christ's Hospital to their engagement.

By accepting the annuity the governors of Christ's Hospital are bound to perform the conditions.

Mr. *Bickersteth* and Mr. *Phillimore* for the governors of Christ's Hospital. This is a case in which a yearly sum of money is given upon a yearly condition. Four boys a year, in six years, the period of education, make twenty-four, which is the number the hospital has to educate under this bequest. The testator contemplated that the governors might at some future time refuse to take in the number of boys, and provides accordingly. It is found that the 400*l.* a year is not sufficient to maintain twenty-four boys, 16*l.* 3*s.* 4*d.* only each, and consequently the funds of the charity are affected by this gift. The funds, destined to other objects, must be withdrawn for the maintenance of these boys and girls. It is become an incumbrance upon the other funds, and the governors have refused to allow a continuance of it unless it shall be decreed against them.

THE MASTER OF THE ROLLS :—The question here is, whether this is a gift of this annual sum, so long as they shall receive the four children, or a gift upon condition that they receive four children yearly?

It is clear that the latter is the true construction ; and [*396] having accepted it, they are bound to the *condition.

The proviso only means this, that the testator would give a collateral remedy to apply the fund to the education of the children in case the governors of Christ's Hospital should omit to receive them, but that does not release Christ's Hospital from their acceptance forever of this annual sum of 400*l.*

Declare that the annuity has been accepted ; that it has become part of the assets ; and that the defendants are not now at liberty to reject the annuity.

The governors to receive four children for each of the preceding years 1828, 1829 and 1830, and four children each year hereafter, upon due payment of the annuity.

Reg. Lib. 1829, A. p. 2521.

1830.—Green v. Spicer.

GREEN v. SPICER.

Will, Construction of.—Insolvent Debtor,

ROLLS.—1830: Tuesday, 2d March.

A testator gave a dwelling-house and a piece of land to trustees upon trust, to receive the rents and apply the same for the board, lodging, maintenance, support and benefit of the testator's son, as they should think proper, for his life; and the application thereof, for the benefit of the son, was to be at the entire discretion of the trustees; and the son was not to have the power in any way to sell, mortgage or anticipate the rents. The son took the benefit of the act for the relief of insolvent debtors. The plaintiffs were his assignees.

The court decreed a conveyance to the plaintiffs. Trustees to retain their costs as between solicitor and client.

ROBERT PINNING, by his will bearing date the 17th day of October, 1815, gave a dwelling-house and piece of land unto and to the use of John Spicer and Daniel Robinson, two of the defendants, their heirs and assigns forever, upon trust, to let and manage the same and receive the rents, issues and profits thereof, *and apply the same rents, issues and [*397] profits, to or for the board, lodging, maintenance, support and benefit of the testator's son, Robert Pinning the younger, at such times and in such manner as they should think proper for and during the term of his natural life; and it was thereby declared to be the testator's wish, that the application of the rents, issues and profits, for the benefit of his said son, might be at the entire discretion of the said John Spicer and Daniel Robinson, and the survivor of them, and the heirs and assigns of such survivor; and that his, said testator's son, should not have any power to sell or mortgage, or anticipate in any way the same rents, issues and profits, or any rents, issues and profits, dividends or interest derived under the said testator's will.

The testator died in 1826; and his son in 1827 took the benefit of the act for the relief of insolvent debtors in England. The plaintiffs are his assignees.

The bill charged that the defendant Robert Pinning the

1830.—Attorney-General v. Christ's

By accepting the annuity the govern
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Mr. *Bickersteth* and Mr. *Phillimor*

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this is a *Pinning the younger*, by his answer, insisted upon that con-

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child

Mr. *Bickersteth* for the plaintiffs, cited *Brandon v. Robinson*, (a)

and *Brandon v. Robinson and Davies*. (b)

Mr. *Agar* and Mr. *Parker*, for the defendants, the trustees, cited
Thomas v. Freeman. (c)

The MASTER OF THE ROLLS decreed that the plaintiffs, as as-
signees of Robert Pinning the younger, the insolvent, were en-
titled to the rents and profits during the life of the insolvent, and
that the defendants, the trustees, should pay the same to the
plaintiffs, after deducting their costs, to be taxed as between so-
licitor and client.

Reg. Lib. 1829, A. p. 1178.

(a) 18 Ves. 429.

(b) *Rose's Bankrupt Cases*, 197.

(c) 2 Ves. 563.

van v. Kinsman.

lands conveyed by the mort-
 uant for life, in February,
 infant, the master reported
 proper conveyances and
 ing twenty-one years;
 made to the manor
 and therefore he

Lis Pendens.

830: 17th June.

to A. in strict settlement, and a manor to
 death a creditor's bill was brought for the adminis-
 stating that the testator owed a debt on mortgage, and some
 er was directed to ascertain what proportion the properties
 several devises ought to bear, and to raise the amount by sale or mortgage.
 master sold the manor and lands. The title to the lands was completed, and
 the purchase money paid, but no good title could be made to the manor. The
 report was confirmed in 1798. B. continued in the possession of the manor, and
 never paid the contribution; and in 1824, he and his eldest son having suffered a
 recovery, sold it to J. I. F. In 1825 A. died, and in the same year his eldest son,
 tenant in tail, filed his bill against B, and his eldest son, and the purchaser.
 Decreed, that this was a purchase *pendente lite*; and the contribution reported by
 the master to be paid from the estate devised to B., with interest and costs, was
 ordered to be raised by sale and mortgage, and paid to the plaintiff.

WILLIAM KINSMAN, by his will dated the 16th of January,
 1778, devised all his messuages, lands and hereditaments called
 Higher or Parish Hay, Sandy Park, and Quarry Park, in Lam-
 erton in Devonshire, unto John Rowe and John Kinsman, his
 brother, and their heirs, in trust for and to the use and behoof of
 his nephew William Kinsman, (the father of the plaintiff,) the
 eldest son of his brother John Kinsman, for life; remainder to
 trustees, to preserve contingent remainders; remainder to the first
 son of the body of the said William Kinsman, his nephew, and
 the heirs male of his body; remainder to the second and other
 sons successively in tail male; remainder to the right heirs of his
 brother John Kinsman.

*The testator, by his will, also devised his manor of [*400]
 Northcombe, in Bratton Clovelly, in Devonshire, to-
 gether with 5s. yearly, payable out of the manor of Shupston

unto the same trustees, in trust to and for the use of his nephew, the defendant Simon Kinsman, the third son of testator's brother, John Kinsman, for life; remainder to trustees to preserve contingent remainders, with remainder to the first and every other son of the body of Simon Kinsman, and the heirs male of the bodies of such first and other sons respectively, severally and successively in tail male; remainder to the right heirs of his brother John Kinsman forever. And the testator thereby also gave, devised and bequeathed all his goods and chattels, and all other his real, personal and testamentary estate unto his nephew William Kinsman, his heirs, executors and administrators, and appointed him executor of his will.

The testator died on the 2d of May, 1780, and his will was proved by the executor; and shortly after his death a creditor's bill was filed for the administration of the real and personal estate of the testator, in which his said nephews, William Kinsman and Simon Kinsman, and also the plaintiff, first tenant in tail of the Lamerton estates; and the defendant William Kinsman, son of Simon Kinsman, and first tenant in tail of the manor of Northcombe, and John Carpenter, a mortgagee, and other necessary parties, were defendants. The cause was heard at the Rolls on the 23d of May, 1792, when the usual accounts were directed to be taken, and advertisements published; and it was ordered, that in case the testator's personal estate should not be sufficient for payment of all his debts, that the deficiency, as to his special debts, ought to be raised and made good out of the testator's real estate, which passed by his will, in proportion to the value of the said real estates respectively, and the master was to settle the [*401] proportions *in which the said estates ought to contribute, to make good the deficiency of the personal estate for the payment of specialty debts; and such deficiency to be raised by sale or mortgage of the said estates respectively, according to such apportionment. The estate devised by the testator to his nephew William Kinsman, was in mortgage to the defendant Carpenter, and was valued at 2,060*l.*; the other estate, devised to Simon Kinsman, was valued at 1,491*l.* 14*s.* At an auction the former was sold for 3,400*l.*, and the latter for 1,687*l.* 12*s.* The

3,400*l.* was paid into court, and the lands conveyed by the mortgagee and William Kinsman, the tenant for life, in February, 1798; but the plaintiff being then an infant, the master reported that he ought to be directed to join in proper conveyances and recoveries to be suffered upon his attaining twenty-one years; but he reported that a good title could not be made to the manor of Northcombe, devised to Simon and his sons, and therefore he did not settle the proportions of the contributions. This report was confirmed on the 20th February, 1798, and on the 18th March, 1798; when the cause came on upon further directions, it was ordered that the costs should be paid, and then the sum of 1,099*l.* 2*s.* 5*d.* to the mortgagee, for his principal, interests and costs, and several other sums. By a subsequent report, dated 7th of June, 1798, the master found that the manor of Northcombe ought to contribute and bear the sum of 873*l.* 1*s.* 8*d.*, as the proportion with the Lamerton estate which had been sold, of the several sums by the order directed to be paid out of the 3,400*l.*

The report was confirmed on the 18th June, 1798.

William Kinsman, the father, died in February, 1825, leaving plaintiff, his eldest son, and first tenant in tail of the estate sold. The plaintiff took out administration *to the [*402] effects of his father. The plaintiff charged that his father was a pauper, and was unable to raise money to prosecute his claim, and that plaintiff was also a laboring man in indigent circumstances, and was ignorant of his right until after the decease of his father, but upon being made acquainted with it, he took steps to enforce it. This charge was supported by evidence. In the meantime, in the year 1824, Simon Kinsman, and his son, sold the manor of Northcombe to the defendant John Inglett Fortescue, for 2,700*l.* The bill prayed that the defendants might pay the sum of 873*l.* 1*s.* 8*d.* and interest, or that the same might be raised by sale or mortgage.

The defendants, Simon Kinsman and William, his son, submitted that this was a stale demand, and ought to be considered satisfied after such a lapse of time and such laches; and they in-

sisted on the benefit of the Statute of Limitations of King James I, and the analogy to that statute adopted by courts of equity.

The defendant Fortescue, by his plea and answer, insisted that he was a purchaser for a valuable consideration, and denied notice of the claim of the plaintiff and of the decree.

A witness proved a conversation with defendants Simon and William Kinsman, in 1818, when one of the defendants stated that a claim had been made to the Northcombe estate, but that the claimant would never be able to make a title to it, because the deeds had been buried in a crock; and another witness proved that he had frequently seen them at their solicitor's, and that about two years since he, witness, had a conversation with that solicitor, when the latter said that he had recommended Simon Kinsman to settle with the complainant before the estate of Northcombe was sold.

[*403] *Mr. *Pemberton* and Mr. *Daniel* for plaintiff:—The estate devised to Simon Kinsman not having been sold, remained liable. He secreted the title deeds to prevent the estate being sold. The person entitled for life became a pauper, and did not die until 1825, when his eldest son, the plaintiff, tenant in tail, became entitled to this sum of money. A decree, which is a final decree in a cause, is not notice to a purchaser, but the pendency of a suit is notice to a purchaser. *Worsley v. Earl of Scarborough*, (a) *Gove v. Stackpoole*. (b) And there being in this case a suit pending, that suit was notice to Mr. Fortescue, the purchaser.

Mr. *Tinney* and Mr. *Parker* for Simon and William Kinsman.

Mr. *Bickersteth* and Mr. *Kindersley* for Mr. Fortescue.

THE MASTER OF THE ROLLS:—I shall charge the estate, and

(a) Atk. 392.

(b) 1 Dowd. 18.

1830.—Owen v. Lys.

those who purchased the estate *lite pendente* are liable; this is plainly *lite pendente*.

Decree that the master take an account of what is due to the plaintiff in respect of the said sum of 873*l.* 1*s.* 8*d.*, and that he calculate interest at 4*l.* per cent. from the 7th June, 1798, the date of the master's report; and that the said sum and interest, with costs, be raised out of the estate by sale or mortgage, and paid to the plaintiff.

Reg. Lib. 1830, A. p. 100.

*ELIZA FELLOWES MARY OWEN, BY ROBERT HEN- [404]
NESSY MOORE OGLE, HER BROTHER AND NEXT
FRIEND, *Plaintiff*; AND JOHN THOMAS LYS, WILLIAM JAMES
PISTOR AND SAMUEL OWEN, *Defendants*.

Married Woman.—Separate Property.—Trustees.

WESTMINSTER HALL.—1830: 28th June.

Bequest to a married woman to her separate use. The court would not order payment into her hands, but ordered the legacy to be carried to her account, with liberty to her to apply.

THE Rev. George Ogle, the uncle of the plaintiff, by his last will and testament in writing, dated 18th November, 1823, after giving divers specific and pecuniary legacies, gave and bequeathed, among other things, to each of the children of his late brother, Colonel Robert Ogle, viz., to Emma Powles, (wife of John Diston Powles,) Sophia Ogle, Robert Hennessy Moore Ogle, Sydney Mary Crawford Ogle, Sarah Ann Ogle, and the plaintiff, Eliza Fellowes Mary Owen, (then Eliza Fellowes Mary Ogle,) the sum of 1,000*l.* And the testator declared his will to be that all the bequests therein, or any codicil or codicils thereto, made or to be made in favor of the said Emma Powles, Sophia Ogle, Sydney Mary Crawford Ogle, Sarah Ann Ogle and Eliza Fellowes Mary Ogle, should be free from the debts, control and en-

gagements of their or either of their present or future husband or husbands, and to and for their own respective sole and separate use and benefit absolutely, notwithstanding coverture; and as to all the rest, residue and remainder of his estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever not therein and thereby disposed of, he gave, devised and bequeathed the same, and each and every part thereof, unto and amongst the said Emma Powles, Sophia Ogle, Robert [*405] Hennessy Moore *Ogle, Sydney Mary Crawford Ogle, Sarah Ann Ogle, and the plaintiff, Eliza Fellowes Mary Owen, their heirs, executors, administrators and assigns, in equal shares and proportions, as tenants in common, and not as joint tenants. And the testator thereby appointed the defendants, John Thomas Lys and William James Pistor, executors of his will.

The plaintiff attained her age of twenty-one years on the 21st September, 1825, and subsequently to the death of the testator, on the 12th August, 1828, married the defendant Samuel Owen, and the bill stated that the bequests made by the will to the plaintiff being made to and for her sole and separate use and benefit, notwithstanding coverture, no settlement thereof was executed prior to or subsequent to the marriage. The plaintiff's legacy of 1,000*l.* was paid.

The defendants realized 14,500*l.* as the residue. And the bill prayed that the defendants Lys and Pistor might be decreed by the court to pay to the plaintiff for her sole and separate use, one-sixth part or share of the sum of 14,500*l.* admitted by them to be in their hands; and might be decreed to pay to the plaintiff, for her sole and separate use, her sixth part or share of the residue of the testator's estate outstanding and unreceived as and when the same should be collected in and received by the defendant Lys and Pistor; and that the defendants Lys and Pistor might pay the costs of the suit.

The defendants, the trustees, submitted to the court, whether the plaintiff was entitled to receive her share without any settlement thereof being made upon her.

1830.—*Banks v. Sladen.*

Mr. *Treslove* and Mr. *Whitmarsh* for the plaintiff.

*Mr. *Tinney* for the trustees.

[*406]

THE MASTER OF THE ROLLS:—Can an executor safely pay this money into the hands of a married lady when it is given to her separate use? The court does not do that. The court will throw a protection around her. Let it be carried to her account, with liberty to her to apply. We must give her the opportunity of deliberating by transferring it to her account.

Costs of all parties to be paid out of her share of the fund.

Decree that the defendants transfer into the name and with the privity of the Accountant-General, in trust in this cause, "the separate account of the plaintiff, *Eliza Fellowes Mary Owen*," the sum of 3,411*l.* 5*s.* 3*l.* 10*s.* per cent. reduced annuities in respect of the plaintiff's share of the residuary personal estate of the testator; and any of the parties are to be at liberty to apply.

Reg. Lib. 1829, B. p. 1734.

*BANKS *v.* SLADEN.

[*407]

Legacy.—Public Funds.—Accumulation.—Remoteness.

ROLLS.—1830: 18th February.

A., by his will in October, 1822, gave 12,500*l.* and 10,000*l.* 4*l.* per cent bank annuities. There were at that time two stocks at 4*l.* per cent., and the testator had moneys in each. One of those stocks was, prior to his death, reduced to 3*l.* 10*s.* per cent.

Held, that the legatees were entitled to have the respective amounts in the other 4*l.* per cent. still existing.

The testator having declared that the dividends should accumulate during the life of his daughters, and until their children respectively should attain twenty-five, when the principal should be transferred to the children, the court directed the dividends to accumulate for twenty-one years, if the daughter should so long live; but the court would not decide on the question of remoteness, as if the daughter left no issue the question would not arise, and the court will not decide a hypothetical case.

JOSEPH SLADEN, Esq., by his will, bearing date 14th October, 1822, gave unto his executors the sum of 12,500*l.* 4*l.* per cent. bank annuities, upon trust, to stand possessed thereof, and to invest the interest, dividends and yearly proceeds, as the same should from time to time become due, in accumulation of the capital, during the natural life of his daughter Sarah, the wife of Lawrence Banks, and after her decease, upon trust, to transfer the principal to her children, begotten or to be begotten, equally as they should respectively attain the age of twenty-five years; and the dividends of the share of such children as should be under the age of twenty-five at the decease of his daughter, should accumulate until such children's shares respectively became payable, with a substitution of the issue of such children as should die in the daughter's lifetime; and cross remainders as between such children who should die without issue; with an ultimate limitation over in the event of his daughter dying without leaving issue.

The testator likewise gave to his executors the sum of 10,000*l.* 4*l.* per cent. bank annuities, in like manner, with respect to his daughter Caroline Matilda, the wife of William Smith, and her children.

The testator, at the date of his will, was possessed of 59,650*l.* 4*l.* per cent. bank annuities.

[*408] *By act 5 G. IV, entitled "an act for transferring several annuities of 4*l.* per cent. per annum into annuities of 3*l.* 10*s.* per cent. per annum," it was enacted, that persons possessed of 4*l.* per cent. annuities might for every 100*l.* receive 100*l.* 3*l.* 10*s.* per cent.

The testator in his lifetime assented to the transfer.

The bill stated that there were other 4*l.* per cent. annuities, and prayed that a sufficient part of the testator's personal estate might be invested in the purchase of 12,500*l.* and 10,000*l.* 4*l.* per cent. bank annuities, upon the trusts of the will.

The defendants stated in their answer, that at the date of the will there was not any other stock called the 4*l.* per cent. bank annuities save the stock in which the testator was entitled, at the time of his will, to the sum of 59,650*l.*, but that at the time of the answer there was no stock known by that name, and the only stocks which yielded a dividend of 4*l.* per cent. were either the new 4*l.* per cent. annuities, or the 4*l.* per cent. annuities 1826; and the defendants submitted, that the legacies would be satisfied by a transfer of 12,500*l.* and 10,000*l.* 3*l.* 10*s.* per cent. annuities.

Testator, at the time of his death, had 76,720*l.* 3*l.* 10*s.* per cent. annuities, converted from 4*l.* per cent. annuities. He also died possessed of 4,725*l.* new 4*l.* per cent. annuities, derived from 4,500*l.* navy 5*l.* per cent. annuities, at the reduction of the interest in that stock in July, 1822, by the government giving 105*l.* new 4*l.* per cent. for every 100*l.* navy 5*l.* per cent.(a)

**Mr. Preston* and *Mr. G. Warry* for the plaintiff:— [*409]
This is not a specific legacy, but a legacy of quantity; there are 4*l.* per cent. annuities now existing, and we claim to be satisfied in that stock. The act changed the 4*l.* per cents to 3*l.* 10*s.* per cents., and had this been a specific legacy we should have been entitled to the amount of the legacy in the 3*l.* 10*s.* per cents. *Swinburn*(b) says that a legacy must be answered out of any fund capable of answering it. A case decided by Lord Eldon, *Attorney-General v. Scriven*, will probably be cited on the other side: there the testator bequeathed "all the residue of my 4*l.* per cent. consolidated annuities at the Bank of England at my decease." Beyond all doubt that was a specific legacy. The Chancellor decided that the legacy was to be satisfied out of those 4*l.* per cents only which would have existed had not the 5*l.* per cents been reduced to 4*l.* per cents but not to be increased by the reduction; and held that all the old 4*l.* per cent. annuities passed by the will, but not the new 4*l.* per cents.

(a) See act 3 G. IV, c. 9, passed 15th March, 1822.

(b) Vol. I, 246.

Swinburn says, "that albeit the testator have no such thing of his own as is bequeathed, yet, nevertheless, the legacy is good in law."(a) The legacy there alluded to, as here, was not specific, but of quantity, as a horse, or a yoke of oxen; and Swinburn says, that the legacy is good in law, though the testator have neither horse nor ox of his own.

It has been decreed, that when the testator gives stock which he does not possess, the legatee is entitled to have stock [*410] purchased.(b) This is a legacy of *quantity*. *In this case there are 4*l.* per cent. annuities, and the executors should be ordered to provide for the legacy out of them.

The testator's intentions will be best answered by ordering the legacies to be paid in the present 4*l.* per cents., for the testator certainly looked to income; but if the court should not think so, then we contend we are clearly entitled to have them satisfied out of the 3*l.* 10*s.* per cents. The act of Parliament(c) provides for specific legacies, but not for legacies of quantity. We admit that the executors may pay us in either of the 4*l.* per cents. now existing:(d) whosoever has to do the first act has the right of election. It is a general principle, that a person who has to make the transfer, has his election.(e)

Mr. *Bickersteth* for the executors:—The thing supposed to be given must be capable of being procured: at the time of the death of the testator there was no such thing as he had given, nor can any such thing be obtained.

In *Fonnereau v. Poynts*,(g) before Lord Thurlow, his Lordship

(a) 1 Swin. 246, and 3 Swin. 922.

(b) *Bronsdon v. Winter*, Amb. 57.

(c) 5 G. IV, c. 11, s. 20.

(d) At the time of this discussion, there were, in fact, two 4*l.* per cent. stocks; one, that reduced from the 5*l.* per cents, and since reduced to 3*l.* 10*s.* per cents, by an act passed 3d May, 1830; and the other 4*l.* per cents, 1826, created by funding exchequer bills, by the act 7 G. IV, c. 39, and which cannot be redeemed until after 5th April, 1833.

(e) *Fontaine v. Tyler*, 9 Price, 94.

(g) 1 B. C. C. 472.

said, "That if it had been doubtful out of what fund the legacy was to arise, that would have been matter to explain by evidence, in order to see whether the description applies aptly or not." And in *Colpoys v. Colpoys*,^(a) the language of the bequest not applying *strictly, and, therefore, being [*411] capable of two interpretations, Sir T. Plumer held that parol evidence might be let in.

The authority of both these cases has been recognized in the manuscript case cited of the *Attorney-General v. Scriven*.

The testator gave 12,500*l.* 4*l.* per cent. annuities, and he must have meant the 4*l.* per cents. then existing; no such stock can now be procured: then it is said the legatees are entitled to something else; but there is nothing in the act which relates to the will of a person living.^(b)

Mr. *Heater*, also for the executors:—It is a specific legacy; it is specific with regard to its description, and where there is a latent ambiguity, parol evidence is admissible to prove the identity, *Beachcroft v. Beachcroft*:^(c) the words of the will are only applicable to the stock existing at the time. It was said by the court in *Sandford v. Raiks*,^(d) that where the subject of a devise was described by reference to some extrinsic fact, it was not merely competent, but necessary, to admit extrinsic evidence to ascertain the fact, and through that medium to ascertain the subject of the devise.

In *Doe dem. Jersey v. Smith*,^(e) a case in the House of Lords, Mr. Justice Bayley says, "The evidence here is not to produce a construction against the natural meaning of the words; but because an indefinite expression is used capable of being satisfied in more ways than one, *and I look to the [*412] state of the property at the time, to see whether it would

(a) Before Sir T. Plumer, Jacob, 451.

(b) See 20th section of the act.

(c) 1 Mad. Rep. 430.

(d) 1 Mer. 653.

(e) 2 Brod. & Bingh. 553.

assist in judging what was the meaning." The legacy cannot be satisfied out of the new 4 per cents.; that not being a fund which the testator contemplated by his will, the legacies would equally not be satisfied by a purchase in the 3 1-2 per cents.; the act applies only to wills partly performed, it does not apply to those wills which had not been called into operation.

THE MASTER OF THE ROLLS:—At the time the testator made his will there were two funds known by the name of the 4 per cent. bank annuities—one of 1780, and the other as the new 4 per cent. annuities; one of them having been created by the conversion of 5 per cents to 4 per cents. Had they remained in the same state, the executors would have provided for the legacies in the one fund or the other; for the only object the testator had was with respect to the income, and it would be indifferent to the intention of the testator whether the investment was in the one fund or the other. Now one of these funds, that of 1780, is since gone, it having been converted into 3 1-2 per cents; but the destruction of that fund does not prevent the executors from making the investment in the remaining fund.

Decree that the investment of a sufficient part of the personal estate of the testator in the purchase of 12,500*l.* 4 per cent. bank annuities, and 10,000*l.* 4 per cent. bank annuities, be made in the fund called new 4 per cent. annuities,^(a) and let the [*413] executors invest a *sufficient part of the testator's personal estate in such purchase in their joint names.

There was another and very important question in the case, whether the trusts for the children of the daughter were not void for remoteness, but as to that his Honor would not decide; for if the daughters left no issue, the question might not arise, and he would not decide upon an hypothetical case.

But he decreed that the dividends of the 12,500*l.*, when pur-

(a) This, of course, means the 4 per cents that were reduced from the 5 per cents, and which, since the decree, have been reduced to 3 1-2 per cent, and not the 4 per cents, 1826.

chased, should accumulate in the same stock for twenty-one years from the death of the testator, if Sarah Banks should so long live; and upon her death, or the expiration of twenty-one years, any of the parties interested in the said sum of 12,500*l.* were to be at liberty to apply; a similar decree, *mutatis mutandis*, was made as to the 10,000*l.*(a)

Reg. Lib. B. 1829, fol. 806.

(a) The Thelluson Act, for restraining accumulations to twenty-one years, directs that the rents and produce of property directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of that act, go to the person who would have been entitled if such accumulation had not been directed.

In the case of *Griffiths and Vere*, (9 Ves. 127,) a testatrix had directed an accumulation for a period, which might extend beyond the time limited by the act, and it was held to be good *pro tanto*, and that during the period of twenty-one years the rents and profits were well directed to accumulate.

*BOURN v. GIBBS.

[*414]

WESTMINSTER HALL.—1830: 17th June.

Gift to a wife, and if she make no disposition of it, then over:

Held, an absolute gift.

RICHARD CLARINGBOULD, by his will, gave and bequeathed as follows: "Also I give and bequeath the sum of 200*l.* stock, residue of my capital stock in the old joint stock South Sea annuities, and also the sum of 200*l.* capital stock in the three *per centum* consolidated bank annuities; and also all the rest and residue of my goods, chattels, effects, debts due and owing to me, money securities for money, money in any of the public stocks or funds of the kingdom; and all other my personal estate whatsoever and wheresoever, and of what kind or nature soever the same may be at the time of my decease, (from and after the payment of all my just debts, funeral expenses, the legacies before mentioned, and legacy of 5*l.* hereinafter bequeathed to my executor John May, hereinafter mentioned, and the charges of proving and executing this my will,) unto my said wife, Elizabeth Clar-

1830.—*Bourn v. Gibbs*.

ingbould, to and for her own use and benefit; and to be at her own absolute disposal, and free from any control whatsoever: provided nevertheless, that if my said wife shall make no disposition thereof, either by expenditure, sale, transfer, assignment, gift or otherwise, in her lifetime, or by her last will and testament, then I direct that the said several sums of 200*l.* of lawful money, and 1,000*l.* stock in the old South Sea annuities, and 200*l.* stock in the three *per centum* consolidated bank annuities, and residuary personal estate, after such payments thereout as aforesaid, or such part thereof as shall remain undisposed of as aforesaid, shall immediately after my said wife's decease go to, and I accordingly give and bequeath the same unto my said two nephews, Peter John Saunders and Thomas Saunders, and my said niece, Ann Gibbs, equally to be divided between [*415] *them, share and share alike, and to their several and respective executors, administrators and assigns; and I make, constitute and appoint my said wife, Elizabeth Claringbould, and Mr. John May of Deal, in the county of Kent, gentleman, executors of this my last will and testament." The question for decision in this cause was, whether the wife took an absolute interest under the will?

Mr. *Bickersteth* and Mr. *Barber* contended that this was an absolute gift, and cited the *Attorney-General v. Hall*,^(a) *Bland v. Bland*,^(b) *Bull v. Kingston*.^(c)

A Mr. *Pemberton* said he did not deny that the widow had the power to make herself the absolute owner. She did not dispose of it by her will, or otherwise. The only question was, whether the widow had assumed to herself the right of ownership? There was nothing in this case to show that she had so done, and, consequently, the bequest over was good.

THE MASTER OF THE ROLLS:—This is an absolute gift.^(d)
Reg. Lib. 1829, A. p. 2182.

(a) *Fitzgibbon's Reports*, 314.

(b) 2 *Cox*, 349.

(c) 1 *Merivale*, 314.

(d) This decision seems to have been made on the authority of the case of the *Attorney-General, on the relation of the Goldsmith's Company against Hall*, as that case

1830.—*Davies v. Thomas*.

is reported by the reporter referred to; but his report of that case should be read with a note, in the second volume of *Equity Cases Abridged*, which refers to a manuscript report of the case; and it seems that Francis Hall suffered a recovery of the freehold property, declared the uses to himself in fee, and then, by his will, devised it to his wife, and appointed her executrix. The recovery, although it could only affect the freehold, yet showed an evident intention to acquire the dominion of all the property devised by the father's will. See *Tamlyn on Terms of Years and other Chattels*, title *Executory Bequests*, p. 86.

However, the three judges who decided this case, appear to have decided without reference to these circumstances. Their judgment is thus stated in the note:—

*KING, C., JEKYLL, Master of the Rolls, REYNOLDS, C. B.—1731: 5th June. [*416]

In regard to the ownership and property of the personal estate, was vested in F. Hall, and not the use only; the limitation to the company is void; it is giving a man an estate in money to spend, and limiting over to another what does not happen to be spent; and therefore the information was dismissed.

In the case of *Strange v. Barnard*, (2 Br. Ch. Ca. 586,) there was also evidence of intention. In that case, after a devise, under a power, of 300*l.*, by a wife to her husband, and at his death the remaining part of what is left, that he does not want for his wants and use, to go over. The husband administered to his wife's effects, and called upon the trustees to transfer the 300*l.* to him, and it was decreed accordingly. There was then intendment, and it was carried into execution.

In *Upvell v. Halsey*, (1 P. W. Rep. 651,) a testator directed that such part of his personal estate as his wife should leave of her subsistence, should return to his sister. The widow married again, and it was argued that the marriage was a gift in law, but the bequest over was held good.

BETWEEN PHILIP DAVIES, *Plaintiff*; AND THOMAS THOMAS AND ELIZABETH, HIS WIFE, *Defendants*.

Condition.

WESTMINSTER HALL.—1830: 5th May.

The plaintiff made a mortgage to the first husband of the female defendant, who, after that husband's death, lent the plaintiff the sum of 200*l.*; subsequently she bought the estate for an additional 400*l.* Soon afterwards she granted a lease to the plaintiff, and signed an agreement indorsed on the lease, that the plaintiff might repurchase within five years, paying the rent as it became due. The rent was not regularly paid, in some instances, not until distresses were levied: Held, that this was not a case of forfeiture, but of particular indulgence; from all the evidence, the court was of opinion, that the transactions were not contemporaneous, and the court held, that the terms not having been fulfilled, the bill must be dismissed, and with costs.

PLAINTIFF being seised in fee of the lands in question, called Retorno, by indentures of lease and release, dated the 3d and 4th February, 1818, conveyed the same unto Henry Twyning, his heirs and assigns, by way of mortgage, to secure 1,200*l.* and interest.

[*417] *The mortgagee subsequently, by his will, gave his estate and interest in the mortgaged hereditaments, and the money due on the mortgage, unto Elizabeth Twyning, his wife, and appointed her his executrix. Afterwards, in 1820, the plaintiff became further indebted to Mrs. Twyning in the sum of 200*l.*, and executed to her a warrant of attorney to confess judgment.

By indentures of lease and release of the 28th and 29th September, 1820, the plaintiff conveyed the property to Mrs. Twyning. The consideration expressed was 1,800*l.*, which included the two sums previously due.

By an indenture of demise, dated the 1st day of January, 1821, Mrs. Twyning demised the land to the plaintiff for a term of ninety-nine years, determinable on the deaths of plaintiff and his wife and son, and the survivor of them, at the yearly rent of 105*l.*, payable half-yearly; and on such lease an agreement was indorsed, that in case the plaintiff should pay the half year's rent due the 25th March, on or before the 4th day of June then next following, and the half year's rent due on the 29th day of September on or before the 26th day of October, then next following in every year, for the term of five years from the date thereof, if the lease should so long exist, then and upon the sole condition of the due payment of the rent half-yearly within the respective days aforesaid, Mrs. Twyning thereby agreed to sell Retorno to the plaintiff, in case he should be desirous of purchasing the same, at any time within five years from the date thereof, but not afterwards, at the price or sum of 1,850*l.*; but if default should be made in payment of the said rent half-yearly within the respective days aforesaid, this agreement

[*418] should become, *and it was agreed and declared between the parties that the same should be void and of no effect.

This agreement was signed by Mrs. Twyning and the plaintiff, and witnessed by one Stephen Phillips.

In 1823, Mrs. Twyning married the defendant, Thomas Thomas.

The bill prayed that the plaintiff might be let in to redeem, or that he might be declared entitled, under the clause of repurchase, to have a reconveyance, upon such terms as the court might deem just.

The defendant Elizabeth Thomas, by her answer, said that some months after she became the purchaser, the plaintiff proposed to become the tenant, and that she should agree that he might repurchase according to the memorandum; but this defendant said that the said lease and the memorandum formed no part of the consideration for the conveyance, and were not part of such transaction; but that the lease and memorandum were a totally distinct, separate and subsequent transaction, and the same were not even proposed or contemplated at the time, nor till some months after the said absolute sale and conveyance had been completed and executed as aforesaid. And the defendant said that the rent had not been paid according to the memorandum; that the plaintiff had given bills for several sums of rent, which had been dishonored, and were then due.

One witness for the plaintiff proved that, at the execution of the conveyance, Mrs. Twyning said that if the plaintiff would repay her the purchase money in five years he might have the lands back again; but a witness examined on behalf of the defendants swore that *he was present at the exe- [*419] cution of the conveyance, and that nothing was then said as to Mrs. Twyning giving back the property on any terms whatever. Another witness for the plaintiff proved a tender to Mrs. Thomas in her dwelling-house, on the 25th January, 1825, of 1,965*l.*, being the full principal and interest due on the mortgage.

 1830.—*Davies v. Thomas*.

It appeared by the evidence of the plaintiff that, on the 10th November, 1824, the defendant Thomas Thomas received the sum of 12*l.* 15*s.* 4*d.*, being the proceeds of a sale made under a distress for arrears of rent due on the 29th of the preceding September; and a witness proved that he was present on the 11th December, 1824, when notice was given on behalf of the complainant to the defendant Thomas Thomas of his intention to avail himself of the memorandum to repurchase.

A witness for the defendants, an auctioneer, proved the taking of distress for recovery of arrears of rent, and that the plaintiff then desired him to surrender his lease, as he had nothing else to do; and plaintiff then delivered the lease to the witness, who delivered it to Mrs. Thomas' agent to be surrendered to her.

The evidence as to value was conflicting.

Mr. *Pemberton* and Mr. *T. Parker* for the plaintiff:—In the cases of *Mellor v. Lees*,^(a) *Willett v. Winnill*,^(b) and *Floyer v. Lavington*,^(c) the principle of redemption was recognized: it is immaterial, that the shape of the transaction is that of purchase and power to repurchase; it is the same as a mortgage [*420] with power to redeem: *the purchase money was not the value; and there is sufficient made out to entitle the plaintiff to redeem. Is he not to be allowed to repurchase because he was a little behind hand, because the rent was not paid at the very day?

THE MASTER OF THE ROLLS:—I think the only material question here is, whether the plaintiff is entitled to repurchase?

Mr. *Bickersteth* for the defendants:—The rent was not regularly paid, in some cases not until distresses were levied. By the express terms of the contract, *time* is made the essence of the contract; the plaintiff then is not in a situation to call on the

(a) 2 Atk. 494.

(b) 1 Vernon, 488.

(c) 1 P. Wms. 268.

defendants for specific performance; time is the essence of this contract.

Mr. *Pemberton* in reply:—There can be no distinction between a mortgage with right to redeem, and a conveyance with a power to repurchase, they both operate as a security: this is a conveyance with a right to repurchase.

THE MASTER OF THE ROLLS:—This is not forfeiture: a particular indulgence is given to the plaintiff, provided certain payments are made at particular times. Is it not like a condition in a mortgage at 5 per cent., that on payment of 4 per cent. at a certain time that shall be a good payment of interest? The debtor is not entitled to a reduction of interest unless payment be made at the time mentioned. It is not proved that these transactions were contemporaneous: the evidence on the part of the defendants proves the contrary. I am clearly of opinion, upon the evidence, that they were not contemporaneous; *and I should have doubted the conclusion of [*421] law if they had been so.

I will look into the question of repurchase. The question is, whether it comes within the principle of forfeiture, or within the principle of indulgence?

Cur. adv. vult.

May 18th.—His Honor gave judgment, dismissing the bill with costs.

Reg. Lib. 1829, A. p. 1424.

CHAMPION v. RIGBY.

Attorney and Client.—Vendor and Purchaser.

ROLLS.—1830: 19th and 21st May.

A solicitor having purchased a property of his client at an under value, the client, eighteen years afterwards, brought his bill to set aside the sale.

The court was of opinion that a solicitor dealing with his client was bound to show

1830.—*Champion v. Rigby*.

that he had given his client the price which he would have advised him to accept from another person; but the plaintiff having failed to show that he was not in a situation during the time which had elapsed to seek relief, the court dismissed the bill, but without costs.

Semble. Had the plaintiff applied to the court in a reasonable time, or had the court been satisfied, by evidence, of his total inability to take proceedings in this court, he would have had relief.

THE defendant was a solicitor, and had acted as such for the plaintiff.

In 1810 the plaintiff was possessed of a wharf, which, in the division of his father's property in 1799, was valued at 700*l*. The plaintiff also purchased a leasehold house and warehouse in Thames street, subject to an under-lease for 1,370*l*., and then purchased the under-lease for 675*l*. The defendant was concerned for him as his attorney in these transactions.

The plaintiff became embarrassed. and the defendant purchased this property from him for 1,400*l*.

*Witnesses for the plaintiff proved that the property [*422] was, in 1810, worth 2,430*l*.

The evidence on the part of the plaintiff went to show that the plaintiff was in embarrassed circumstances from the time of the sale up to 1824; but by the answer, the defendant stated that the plaintiff received a considerable accession of fortune on the death of his mother, a few years after the sale, and kept saddle and sporting horses.

The bill was filed in 1828.

Mr. *Bickersteth* and Mr. *Younge* for the plaintiff:—The court must interfere to protect clients from the conduct of their solicitors.

It is the duty of a solicitor, who purchases from his client, to show that he has given an adequate consideration; in this it was

clearly inadequate. It is evident that, during the whole transaction, advantage was taken by the defendant of the plaintiff, and of the influence which, as the plaintiff's solicitor, he possessed.

Mr. *Tinney* and Mr. *Pemberton* for the defendant:—Where a client comes to a solicitor and offers a property for sale, that solicitor does not come within the rule of a purchase by a client from a solicitor, the transaction being independent of the connection between attorney and client, he not being the attorney in *hac re. Montesquieu v. Sandys*, (a) *Cane v. Lord Allen*, (b) *Gibson v. Jeyes*. (c) The case before the court is a single transaction of purchase and sale. The remaining question *is, whether at [*428] a distance of eighteen years this transaction ought to be set aside? A person applying to this court ought to show diligence and dispatch: it is not fair to call upon a person to defend his conduct at that distance of time. For eighteen years the defendant has been allowed to consider this as a part of his income, spending it on his own family. After so long a time, the plaintiff cannot come into a court of equity, unless it can be shown that he had ever since labored under the same disability which first led him into the transaction; but there is no evidence to that effect; there is evidence of his having subsequently possessed abundant means. We prove his receipt of large sums.

THE MASTER OF THE ROLLS:—The receipt of sums is nothing; for a man may have demands upon him to ten times the amount.

Mr. *Pemberton* read a passage from the defendant's answer, that the plaintiff had kept saddle and other sporting horses, and was lately the owner of, and about to run a horse, so that defendant believed the plaintiff could not have delayed instituting proceedings against the defendant for want of proper means.

THE MASTER OF THE ROLLS:—Then the defendant has, by his

(a) 18 Ves. 313.

(b) 2 Dow, 289.

(c) 6 Ves. 266.

answer rendered it necessary that the plaintiff should show why he did not proceed sooner.

Mr. *Pemberton* :—Due diligence ought to be evinced by a party who applies for the extraordinary aid of this court. In *Gregory v. Gregory*,^(a) a suit, after a lapse of eighteen years, was dismissed.

Purcell v. Macnamara.^(b) Ignorance on the part of the [*424] plaintiff there *was none; he knew the value of the property well; difficulty in pursuing his remedy he had none, for he had sufficient means, and he consulted a solicitor. The premises are now pulled down, so that their former state is quite a matter of conjecture; and those who could give evidence in the plaintiff's favor have died one after the other. I trust your Honor will be of opinion, that however questionable this transaction might have been originally, still, that, after the lapse of eighteen years, the plaintiff is not entitled to come here and seek relief.

Mr. *Pemberton* was about to read evidence.

THE MASTER OF THE ROLLS :—I had better call upon the plaintiff. The only difficulty is the point as to the time which has elapsed.

Mr. *Bickersteth* then read evidence to explain that the plaintiff did not proceed sooner from the state of his circumstances; and which stated that the plaintiff was in a state of embarrassment down to 1824.

THE MASTER OF THE ROLLS :—The question is, whether what has been proved accounts for doing nothing for eighteen years, and whether a court of equity should interfere after this lapse of eighteen years?

I am of opinion that a court of equity ought not to interfere, unless the plaintiff can show that he had not been in a situation to seek relief.

(a) *Cooper*, 201.

(b) 14 *Ves.* 90.

1830.—Walsh v. Wallinger.

Mere evidence of embarrassment is not sufficient; the plaintiff in this case had opulent relations.

*I am of opinion, that a solicitor dealing with his [*425] client is bound to show that he has given his client the price which he would have advised his client to accept from another person.

I am of opinion, that that was not the case here; but the plaintiff has not applied in time, nor accounted for delay.

Bill dismissed, but without costs.

WALSH v. WALLINGER.

Will.—Powers.

ROLLS.—1830: 2d December.

A testator directed trustees to sell his real and personal estate, and pay the amount of the produce to his wife, trusting that she would provide for his family, and at her decease that she would *give and bequeath* the same to her children by him, as she should appoint. The widow, by will, made an appointment to five of her seven daughters.

Held, that the appointment was void, all the children being entitled to the benefit of the fund.

Held, that the widow could only execute the power by will, and that only such of her children took an interest as survived her, and consequently that the representative of a child who died before her could not take any part of the fund.

J. W. A. WALLINGER, by his will dated the 19th January, 1805, gave unto his wife, Matilda, all his personal estate and effects for her sole use; and he gave and devised unto his brother, Joseph Wallinger, William Baldwin and William Turner, and their heirs, his estate called Hare Hall, and other lands, and all other his real estate, in trust, to sell and dispose of the same as soon as conveniently might be after his decease, and after deducting the costs, and the payment of all incumbrances and his just debts, to pay the residue thereof unto

1830.—Walsh v. Wallinger.

his wife, to and for her own use, benefit and disposal, trusting that she would thereout provide for and maintain his family, and particularly his only son, and at her decease, give and bequeath the same to her children by him, in such manner as she

should appoint. And the testator appointed his wife [*426] and the said three *trustees, executors of his will. The testator left one son and eight daughters by his said wife.

The widow and W. Turner, proved the will, the other two executors renounced the probate, but all three trustees took upon themselves the execution of the trust. By a deed, dated the 29th March, 1805, Matilda Wallinger, the widow, released unto the trustees all her right and interest, in or to the residue of the moneys to arise by sale of the real estate, devised by the testator in trust to be sold, but nevertheless upon such trusts as the same would have been subject to in the hands of the said Matilda Wallinger, widow of the said testator, if he, instead of expressing himself as trusting, or intimating that his said trustees should trust, that his said wife would thereout provide for and maintain his family, and particularly his only son; and at her decease, give and bequeath the same to her children by him, in such manner as she should appoint, had in and by his said will imperatively directed her, the said Matilda Wallinger, widow, during her life, out of the interest of the said residue, to provide for and maintain his children, and particularly his only son, and at her decease to give and bequeath the whole of the residue to her children by him, in such manner as she should appoint.

The real estates were sold, and in February, 1815, there was standing in the name of Joseph Wallinger, the surviving trustee, the sum of 2,508*l.* 3 per cent. consols; of which, by indenture dated the 4th February, 1817, in pursuance of the power remaining in her by virtue of the said will, and of the indenture of the 29th March, 1805, she appointed the trustees to sell out so much stock as would produce 1,000*l.*, and pay it to her son, J. A. Wallinger, for his sole and separate use, and he thereby agreed that he should not be entitled to any further share, [*427] unless his mother, by deed or will, *made a further ap-

1830.—*Walsh v. Wallinger.*

pointment in his favor;(a) and on the 15th February, 1817, the son entered into a covenant to pay his mother 5 per cent. on the 1,000*l.* during her life.

Caroline Wallinger, one of the daughters, died in June, 1828, and John Arnold Wallinger took out administration to her effects.

Mrs. Matilda Wallinger made her will, bearing date the 13th May, 1828, as follows:—"This is the last will and testament of me, Matilda Wallinger, at Nice, and as I mentioned in my will bearing date the 30th March, 1805: My daughter Elizabeth Franciska, being amply provided for by the late Mr. Fisher of Ealing Park, that she was not to have any share of my property, and I wish to be understood that it must remain so; likewise Anna Maria Daniel, my eldest daughter, is not to have any share in any of my property, being likewise well provided for; likewise my son, John Arnold Wallinger, having had 1,000*l.* of me, which was thought an ample share, and as much as could be spared from my daughters, but I now bequeath to him 50*l.* for mourning. I do hereby direct and appoint that the residue of such trust moneys as are in the stocks, funds or securities and annuities, shall be shared alike between my daughters, Matilda Wallinger, Charlotte Wallinger, Mary Anne Wallinger, Harriett Wallinger, Louisa Wallinger, in equal shares and proportions, and share and share alike."

Mrs. Wallinger, died in May, 1829, and left her son and seven of her daughters, of whom six were *married, [*428] surviving her. At the time of her will and death the trust fund amounted to 7,276*l.*, 3 per cent., reduced annuities, and 935*l.* 3 per cent. consols, standing in the name of Joseph Wallinger, who died in December, 1827, having appointed A. M. Wallinger, his widow, executrix thereof.

This bill was brought by the five daughters, to whom the

(a) There was no attempt to disturb this, the sum appointed being about what the son would have received under the principle of the judgment given.

1830.—Walsh v. Wallinger.

property was appointed by the will of Matilda Wallinger, submitting that her will was a good execution of the power of the will of the husband, and of the indenture of the 29th March, 1805, and that the stock ought to be sold and divided amongst them.

By the answers it was submitted that the will of the testatrix was void as to the trust fund, by reason of her having appointed no part amongst the defendants, Ann Maria Daniel, Elizabeth Franciska Roberts, or Caroline Wallinger, deceased, or her representatives; and the son claimed to have a distributive proportion to make up the 1,000*l.* received by him out of the trust fund equal in amount to the shares of the other claimants.

Mr. *Pemberton* and Mr. *Longley* for the plaintiffs, argued that the words of the will of the testatrix being, "In such manner as she shall appoint," show that she was to have a large discretion, and cited *Burrell v. Burrell*,^(a) *Civil v. Rich*,^(b) and Lord Alvanley's observations on *Burrell v. Burrell* in *Kemp v. Kemp*,^(c) and in *Spencer v. Spencer*,^(d) and referred to the principles sanctioned by stat. 1 W. IV, c. 46.

Mr. *Tinney* and Mr. *Temple* for defendants, the two [*429] daughters not provided for by their mother's will, *and who survived her:—*Burrell v. Burrell* was apologised for by Lord Alvanley; *Gibson v. Kinven*,^(e) is a case the courts have come back to.

Mr. *Bickersteth* for John Arnold Wallinger, the administrator of Caroline Wallinger:—This is not confined to a trust for children living at the death of Mrs. Wallinger. The words of the will, "In such manner," must be considered as pointing to the shares or proportions. The authority of *Burrell v. Burrell*, has been doubted. *Vanderzee v. Aclom*.^(g)

(a) Ambl. 660, before Lord Camden.

(b) 1 Ch. Ca. 309.

(c) 5 Ves. 849.

(d) 3 Ves. 362.

(e) 1 Vern. 66.

(g) 4 Ves. 770.

Mr. *Pemberton* in reply :—In *Kemp v. Kemp*, the word “amongst” was the ground of the decision. *Gibson v. Kinver* is not reconcilable with *Burrell v. Burrell*. *Gibson v. Kinver* was an early case. Unless *Burrell v. Burrell* is to be overruled, your Honor will not hold the power to be ill executed. The whole doctrine is extremely artificial, and will now, fortunately for the ends of justice, be entirely swept away.

THE MASTER OF THE ROLLS :—The decisions are to be followed as precedents. The testator gave the residue to his wife, trusting that, at her decease, she would give and bequeath the same to her children by him. Do the words “in such manner as she shall appoint” mean a right to exclude any? Under such words it has been decided that all the children should take. All children capable of taking by gift and bequest of the mother take an interest here. John Arnold Wallinger has excluded himself, and can take nothing.

December 6th.—Mr. *Pemberton* and Mr. *Longley* :—The remaining question is, whether a representative *of a [*430] deceased child can take a share in default of appointment? There are two recent decisions, which clearly establish that such representatives cannot take. *Kennedy v. Kingston*, (a) *Needham v. Smith*; (b) and there are no cases contrary to these decisions. The words “do,” “lego,”—“I give and bequeath,” are usual testamentary phrases; and the testator in this case having empowered his wife to give and bequeath, could only have contemplated a disposition by her by will, and only such children could take under her will as might survive her. *Doe dem. Thorley v. Thorley*, (c) and *Justinian’s Institutes*, lib. 2, tit. 20, par. 30, 31.

Mr. *Tinney* and Mr. *Temple* for other parties in the same interest.

Mr. *Bickersteth* for the administrator of Caroline Wallinger :—

(a) 2 Jac. & Walk. 431.

(b) 4 Russ. 318.

(c) 10 East. 438.

1830.—*Walah v. Wallinger.*

The children took a vested interest, and the widow a power of appointment. The mode of divesting that interest was an actual appointment by the widow. She had it in her power to make a provision in her lifetime, as she in part did for John Wallinger.(a) *Boyle v. Bishop of Peterborough*,(b) *Butcher v. Butcher*,(c) *Malim v. Keightley*,(d) *Malim v. Barker*,(e) *Grace v. Wilson*.(g) It is immaterial whether done by deed or will, the interest being vested, subject only to be divested by an execution of the power. The question was whether the lady, upon the marriage of any of her children, could make a settlement? Could she not, [*481] as she did, *upon the son setting up in business, when she made him an advance of 1,000l.? The will is a bad appointment, for it excludes two of the children, who were living at the death. There is no case like this in its circumstances, yet upon the general principle of a vested interest, liable to be divested by the execution of a power, and that execution having failed by the execution being imperfect, the interest has not divested.

Mr. Cooke with Mr. Bickersteth.:—Every object of the power took a vested interest, and in the event of any of them dying during the life of the donee of the power, the share of the person dying went to that person's next of kin.

THE MASTER OF THE ROLLS.:—The question is, whether this is a general power, or a power limited in the mode of execution to a will? I hold the words "give and bequeath" are only testamentary, and the power given could only be executed by will. The words of the will do not give a vested interest to the children, consequently the representative of Caroline Wallinger, who died before her mother, could not take, and those only could take who survived the donee of the power.

Declare that under the will of J. W. A. Wallinger, the wife

(a) 1 Roper on Legacies, 537.

(d) 2 Ves. jun. 333.

(b) 1 Ves. jun. 299.

(e) 3 Ves. jun. 150.

(c) 1 V. & B. 90.

(g) Rolls MS. October, 1811; Sugden on Powers, 210, 2d edit.

had virtually an estate for life only in the residue, with a power of appointment by her will only; that the words "give and bequeath" were testamentary; that consequently only children alive at the death of the wife could have taken under her appointment; and only such children could take (they having no vested interest in them in the wife's lifetime under the testator's will,) in default of appointment. Hence, that Caroline *Wallinger, who died in her mother's lifetime, had no [*482] vested interest, and defendant John Wallinger, her representative, can take nothing in her right.

Costs of all parties out of the estate. Costs of Mrs. A. M. Wallinger, the trustee, as between solicitor and client, including her previous reasonable expenses relating to the trusts.

Decree that the appointment of the trust fund made by the will of Matilda Wallinger is void, and that the trust funds are divisible between the only children of John Wallinger, Arnold Wallinger, Esq., deceased, the testator in the pleadings named, who were living at the time of the death of the said Matilda Wallinger, (except the defendant John Arnold Wallinger,) in equal seventh parts. The decree went on to order, that some of the married ladies who resided abroad should attend certain persons named in the decree, to be examined as to the disposal of their shares.(1)

Reg. Lib. 1829, B. p. 518.

(1) A power to executors "to sell or exchange his (testator's) real estate, as they might judge necessary for the advantage of his estate," is a naked power, and must be executed by all the executors. *Woolridge v. Watkins*, 3 Bibb, 350. A power, in a will to executors to sell, is a naked power, and gives neither right of property nor right of action. *Jameson v. Smith*, 4 Bibb, 307. A naked power to executor to sell, does not at common law survive. *Osgood v. Franklin*, 2 Johns. Ch. Rep. 1; *S. C.*, 14 Johns. Rep. 527; *Bergen v. Bennett*, 1 Cal. Ca. 15. But if executors, having power to sell the real estate, are vested with any interest, legal or equitable in the estate, the power survives. *Ib.* So, if the executors are charged with a trust, relative to the estate, and depending on the power to sell, the power survives. *Ib.* Where a naked power is given by law to an officer, or other person, that power must be strictly pursued, especially if such proceedings involve a forfeiture; and it devolves on him who claims a right under the exercise of such power, to show that it was, in all respects, exactly pursued. Therefore, where land is sold by a sheriff

1830.—*Walah v. Wallinger.*

for non-payment of taxes, it is incumbent on the purchaser to show that all the steps have been regularly taken which the law requires in such cases. *Nalle's rep's v Fenwick*, 4 Randolph, 585. Where several persons are appointed trustees, or have power to act for a mere private (not a public) purpose, they must all join in executing the trust or power. This rule applies as well to trusts coupled with an interest, or surviving trusts, as to naked powers. And if this rule be not complied with, the act is merely void, not voidable only; and a stranger may object the defective execution. *Sinclair v. Jackson*, 8 Cowen, 543. A power coupled with an interest, does not expire with the death of the person creating it. *Hunt v. Roemanerie*, 2 Mason, 244. A naked power does not necessarily expire with the death of the person creating it. It may necessarily be such as can be exercised only after the death of such party, as a power to executors to sell lands. *Ib.* A naked power, which dies with the party creating it, is such as requires the power to be executed in the name and as the act of the grantor, and not of the grantee. As a power of attorney to execute an instrument or do other acts in the name of the grantor. *Ib.* A power of attorney given as a collateral security for a debt is irrevocable by the grantor; but it dies with the grantee. It is not, in the sense of the law, a power coupled with an interest. *Ib.* A testator devised as follows: "I will and bequeath that the plantation I now live on be sold at public or private sale, and the proceeds thereof be laid out in land in the Indiana territory, and the right thereof vested in my negroes, each or all of them with their increase, to whom I give their entire freedom, and the settling of them on the above named land under the direction of my executors." Held, that the legal estate was not vested in the executors; that they had but a bare power to sell, which, when executed, vested the estate in the purchaser, under the will. *Hope v. Johnson*, 2 Yerger, 123. A power coupled with an interest is not revocable. *Hancock v. Byrne*, 5 Dana, 514. In the construction of powers of sale in a will, the intention of the testator is much regarded. *Osgood v. Franklin*, 2 Johns. Ch. Rep. 1; *S. C.*, 14 Johns. Rep. 517, on appeal; *S. P. Bergen v. Bennett*, 1 Cai. Ca. 15. If all the executors named in a will have power to sell, and some refuse to act, the sole acting executor has power in New York, under the statute, (*N. R. L.*, vol. I, p. 366,) to sell. *Davoue v. Fanning*, 2 Johns. Ch. Rep. 254. If a will, appointing executors, directs lands to be sold, without saying expressly who shall sell, the executors, it seems, must exercise this power. *Ib.* Executors with a power to sell cannot sell by attorney. *Bergen v. Duff*, 4 Johns. Ch. Rep. 368. Where a power was given to B. and C., executors, to sell certain lots of land, if, under the circumstances of the times, they should deem it prudent, held, that an agreement for the sale entered into by B., for himself and C., under a power of attorney from the latter, was not valid, the power to sell being a personal trust and confidence, to be exercised by them jointly. *Ib.* A devise to executors in trust for C. for life, and if she died without issue, the remainder over, with power to the executors "to sell and dispose of so much of the real estate as should be necessary to fulfil the will," is sufficient to authorize the executors (the persons in remainder being infants) to execute leases for years, of the real estate, upon such terms as would carry the testator's intention into effect. *Hodgeson v. Riker*, 5 Johns. Ch. Rep. 163. Where a trustee is directed to sell the trust property "at public auction or otherwise, in whole or in parcels, on giving three week's notice," &c., the directions as to notice apply to a sale at public auction, and the trustee having a discre-

1830.—Fosbrooke v. Balguy.

tion, a private sale by him is valid. *Minuse v. Cox*, 5 Johns. Ch. Rep. 446. But at all events the same would be valid, so as to confer a good title, though the trustee might be responsible for any deficiency of the price below the real value of the land. *Ib.* A power to mortgage includes in it a power to authorize the mortgagee to sell in default of payment. *Wilson v. Troup*, 7 Johns. Ch. Rep. 32. A power of attorney, executed to a third person, authorizing him to sell mortgaged premises on default of payment, for the benefit of the mortgagee, is a valid power for such purpose; and after a *bona fide* sale made under the power, proper notice having been given by advertisement, no equity of redemption remains in the mortgagor, or those claiming under him. *Brisbane v. Sloughdon*, 17 Ohio Rep. 482. Such sale will be binding, though made during the pendency of a bill in Chancery to foreclose the mortgage. *Ib.*

*FOSBROOKE v. BALGUY AND OTHERS. [*433]

Practice.

WESTMINSTER HALL.—1830: Monday, 21st June.

The eighth of Lord Lyndhurst's orders, applies only to the answer to exceptions.

THIS was the petition of the plaintiff, stating that the defendant filed his answer in this cause on the 3d February, 1830, to which exceptions were filed on the 22d March following. By an order bearing date the 30th day of March, it was referred to the master in rotation, to look into the bill, and the answer and the exceptions taken thereto by the plaintiff, and certify whether the answer was sufficient in the points excepted to or not. The master, by his report, dated 22d April, certified the defendant's answer to be insufficient in the whole of the exceptions taken thereto, and allowed the defendant one month's time to put in his further answer. The report was filed on the 24th of April, on which day the petitioner obtained an order to amend his bill, and that the defendant should answer the amendments at the same time that he answered the exceptions. The amended bill was filed on the 14th May, 1830. By an order, bearing date 7th June, it was ordered, that the defendant should have a commission to take his answer to the amendments and exceptions, and

 1830.—Fosrooke v. Balguy.

six weeks' time to return the same. The last mentioned order was made *ex parte*.

The prayer was, that this order might be discharged for irregularity.

Mr. Rogers for the petitioner :—The order for reference was on the 30th March ; the master on the 22d April, reported [*434] the answer insufficient, *and gave a month's time to answer. The order complained of is irregular.

Mr. Campbell:—The plaintiff did not file his amended bill until the 14th of May, 1830, being the last day of the three weeks after the order to amend,(a) so that according to the plaintiff's construction, we should only have had from the 14th to the 20th to answer the amended bill. It would be a most oppressive construction of the eighth order,(b) if it were held that the defendant must answer the exceptions and amended bill within the month given for answering the exceptions by the master.

THE MASTER OF THE ROLLS:—I am of opinion that the eighth order applies only to the answer to exceptions. I must, therefore, dismiss the petition with costs.

(a) Every order for leave to amend the bill, must contain an undertaking by the plaintiff, to amend the bill within three weeks from the date of the order.

(b) The eighth order is as follows :—

That if upon a reference of exceptions the master shall find the answer insufficient, he shall fix the time to be allowed for putting in a further answer, and shall specify the same in his report, from the date whereof such time shall run ; and it shall not be necessary for the plaintiff to serve a subpoena for the defendant to make a better answer. And any defendant who shall not put in a further answer within the time so allowed, shall be in contempt, and be dealt with accordingly.

See Brown's Practice of the High Court of Chancery, Vol. I, p. 24.

1830.—Cockerell v. Cholmeley.

*BETWEEN SIR CHARLES COCKERELL, BART., HENRY [435]
 TRAIL, SIR CHARLES RICHARD BLOUNT, BART., THE
 MOST NOBLE GEORGE DUKE OF MARLBOROUGH AND JAMES
 BLACKSTONE, LL.D., *Plaintiffs*; AND FRANCIS CHOLMELEY,
 ESQ., *Defendant*.(a)

*Power of Sale.—Timber.—Effect of Agreement in Equity to Execute
 a Power of Sale.—Mistake.—Acquiescence.—Confirmation.*

ROLLS.—1830: 16th March.

Sir H. E. by his will, devised his lands to trustees, to the use of his eldest son for life, *sans waste*, and in strict settlement, with remainders over, under which the defendant ultimately became tenant in tail in possession; and the testator gave his trustees a power of sale, with the consent of the tenant for life. The lands were sold for a price fixed, exclusive of the timber, which was to be valued, and the amount of the valuation paid to the tenant for life. By the conveyances the surviving trustee, in consideration of the price fixed, conveyed the land to the purchaser; and the tenant for life, in consideration of the value of the timber, which had then been determined, conveyed the timber to the purchaser.

Held, that this was a bad execution of the power in a court of equity.

The plaintiff having endeavored to show that there was in the letters which passed prior to the conveyance, an agreement for the sale of the estate and timber, without any stipulation that the price of the latter should be paid to the tenant for life, pressed the court to aid the execution of the power, but the court being of opinion that there was not such an agreement, and that it was understood by the parties that the tenant for life was to receive the value of the timber, and that the drawer of the instrument had not mistaken the intention of the parties, refused to aid the execution of the power.

Held, that acquiescence in a transaction cannot be maintained, unless it be shown that the party whose interest are affected knew not only the facts which affected his interest, but the legal effects of those facts upon that interest.

SIR HENRY ENGLEFIELD, by his will, on the 27th day of November, 1778, gave the manor of Early, and his manor and mansion-house called White Knights, and all and every his messuages, lands, tenements, wood-grounds, rents, tithes and hereditaments, situate in the parish of Sonning St. Giles', in Reading and Englefield, or elsewhere in the county of Bucks, unto Lord Cadogan and Sir Charles Bucke, and to their heirs, to the use of his son, Henry Charles Englefield, for life

(a) *S. C. 1 R. & M. 418.*

[*436] **sans* waste and in strict settlement; remainder to his second son, Francis Michael Englefield, in strict settlement; remainder to testator's daughter, Teresa Anne Englefield, in strict settlement; with divers remainders over. And the said testator, by his will, declared that it should be lawful for the trustees, or the survivor of them, or the heirs of such survivor, from time to time and at all times during the lives of H. C. Englefield, F. M. Englefield and T. A. Englefield, or during the life or lives of any or either of them, at the request and by the direction or appointment of the person who, for the time being, should be in possession of or entitled to the rents and profits of the said manor and tenements by virtue of the limitations therein contained, signified by any deed or writing, deeds or writings, under hand and seal, attested by two witnesses, to make sale and dispose of all or any part or parts of the manor and tenements aforesaid, to any person or persons whomsoever, either together or in parcels, for such price or prices in money, or in any other equivalent, as to the trustees should seem just and reasonable; and to that end for the trustees by deed or writing under their hands and seals, sealed and delivered in the presence of two or more witnesses, to revoke, determine or make void all and every or any of the use and uses, trusts, estates, powers, provisoes and limitations thereinbefore limited, and appoint the manor and tenements aforesaid, whereof the uses should be revoked either unto such purchaser or purchasers, his, her or their heirs, or otherwise to limit such new or other use or uses as should be requisite; and upon payment and receipt of the money arising from the sale, to give and sign proper receipts, which should be sufficient discharges. The purchase money to be laid out by the trustees, with the like consent, in the purchase of other lands, to be settled to the like

[*437] uses; and in the *meantime to be placed out on real or government security.

In 1782, Teresa Anne Englefield married, and the defendant, Francis Cholmeley, is her eldest son, and the first tenant in tail.

The bill stated the preceding facts, and that William Byan

Martin, Esq., having caused an application to be made to Joseph Pearson, the solicitor of Sir Henry Charles Englefield, for the purchase of the manor, mansion-house and premises, he wrote to Sir Henry upon the subject, and Sir Henry, by letter, answered Mr. Pearson, that the price was 12,000 guineas, exclusive of the timber, which at a fair valuation, he fancied, would come to 2,000 more. Ultimately, after a great number of letters had passed, Mr. Martin acceded to the proposition; but the furniture was to be included in the 12,000 guineas. Mr. Martin was to have the manorial rights, but not the ground or soil of the commons and lands not purchased. And Mr. Martin also agreed to buy the *fox holds, other parts of the premises* devised by the will, for 800*l.*; so that the purchase money amounted to 13,400*l.*; and the timber was valued at 2,446*l.* 7*s.* 6*d.*

Sir H. C. Englefield communicated this to Lord Cadogan, the surviving trustee, and requested him to revoke the uses and convey the property to Mr. Martin, for the considerations aforesaid; and Lord Cadogan approved of, consented to, and adopted the agreement,^(a) and undertook and agreed to execute the necessary deeds *for carrying the same into execution, [*438] but it was agreed that the value of the timber should be paid to Sir H. C. Englefield for his own use. An indenture, bearing date the 12th of May, 1788, was then made and executed, which recited that Lord Cadogan, by virtue of the power in the will, at the request and by the direction of Sir H. C. Englefield, testified by that writing under his hand and seal, and contracted and agreed with Mr. Martin for the sale to him of the manor of White Knights, with the rights, royalties, manors and appurtenances thereto belonging, except as thereafter is excepted, and also the capital mansion and mansion-house called White Knights, with the out-houses, edifices, yards, gardens, orchards and other appurtenances thereto belonging; and the fixtures, household goods, furniture, garden tools, implements and utensils in and about the same, and of the messuage, park, lands, tithes and hereditaments in the parishes of Soning and St. Giles',

(a) The defendant, by his answer, alleged that Lord Cadogan did not interfere with the sale of the timber, or judge of the reasonableness of its price.

in the county of Berks, at the price of 13,400*l.*; and that the said Sir H. C. Englefield, who, as tenant for life, without impeachment of waste, was entitled to the timber and trees standing and growing, and being on the said premises so agreed to be sold to the said W. B. Martin, had agreed to sell the said timber and timber trees unto the said W. B. Martin for 2,148*l.* By this deed, Lord Cadogan, in consideration of 13,400*l.* with the required consent, revoked the uses created by the will, and limited and appointed the premises unto W. B. Martin and Martin York, and their heirs, to the use of them and the heirs and assigns of Martin York. But nevertheless, as to the estate of Martin York, his heirs and assigns, in trust for W. B. Martin, his heirs and assigns. By a further witnessing part, Lord Cadogan and Sir H.

C. Englefield and Dame Katherine Englefield, granted [*439] unto W. B. Martin and *Martin York the manor of

White Knights, &c., (save the ground and soil of the commons, waste lands and other commonable places within the manor, and the right of depasturing cattle on the same, in respect of the other hereditaments devised by the will, and all timber on the said commons, and also any allotment which, upon an enclosure of the commons, might be made of the manor of White Knights.) To hold as in the appointment.

By a further witnessing part, Sir H. C. Englefield, in consideration of 2,448*l.*, conveyed the timber and fruit trees, to hold in like manner: and by another witnessing part, in consideration of the 13,400*l.* paid to Lord Cadogan, Sir H. C. Englefield assigned the fixtures, household goods, furniture, implements, utensils and other movables in and about the premises unto W. B. Martin, his executors and assigns.

Some doubts having arisen about the transaction as to the timber, the sum of 2,448*l.*, and the dividends thereon, amounting altogether to the sum of 3,681*l.* 4*s.* 3*d.* were, by Sir H. C. Englefield, transferred to Lord Cadogan upon the trusts of the will.

The estates so purchased by Mr. Martin, became vested in the Duke of Marlborough, (then Marquis of Blandford,) Thomas

Coutts and James Blackstone, in trust for W. B. Martin, and they by indentures bearing date the 13th and 14th of February, 1814, mortgaged the property in fee to Archibald Paxton, Sir William Paxton, Sir Charles Cockerell and Henry Trail, to secure 45,000*l.* advanced and lent to the Duke of Marlborough, with interest.

By a deed dated the 10th of November, 1814, the Duke of Marlborough further mortgaged the property to Sir *Charles Cockerell to secure 20,000*l.* *navy five per cents.* [*440] and the dividends.

Lord Cadogan having died, leaving his eldest son a lunatic, an act of Parliament was passed appointing new trustees, and in that act the sale to Mr. Martin was recited, and the moneys and securities in which the purchase money was invested were directed to be transferred to the new trustees.

The sum of 4,282*l.* 14*s.* 9*d.*, part thereof, (and which included the purchase money of the timber,) was, in November, 1819, sold out with the privity of the defendant, and with his consent applied in defraying the costs of the act of Parliament, the expenses of enclosure and exchange of other lands devised by the will; and other charges relating to the trust estates. Some part of the purchase money had been previously applied to the purchase of land tax of other estates of Sir H. Englefield.

Under a decree in a suit of Chancery, wherein Mr. Paxton and his co-mortgagees were plaintiffs, and the trustees of Mr. Martin were defendants, the property purchased by Mr. Martin was sold to the plaintiff, Sir Charles Richard Blount, for 37,000*l.*

By the death of Sir H. C. Englefield, the first tenant for life, without issue in 1822, (the second son of the settler having previously died without issue, and Teresa Anne, the daughter of the settler, having died on the 3d of October, 1810,) the defendant, the son of Teresa Anne, who was of age in June, 1804, became tenant in tail in possession; and in July, 1822, presented a peti-

tion to the Master of the Rolls, setting forth the sale to Mr. Martin, and the said application of the sum of 4,282*l.* 1*s.* [*441] *9*d.*, and praying that the trustees might be directed to assign the sum of 12,500*l.*, and another small sum, both the purchase moneys of Mr. Martin to the petitioner, and after a reference to the master, an order was made accordingly.

The bill then stated, that in Michaelmas Term, 1823, the defendant brought his writ of *formedon*, and the question therein was, whether, according to the legal construction of the will of Sir Henry Englefield, and of the indenture of the 12th May, 1783, the power was well executed; whereon the Court of Common Pleas decided, that Lord Cadogan having by that deed intended to convey the property without the timber, the deed was void, and judgment was given for the demandant.

The bill charged confirmation, and prayed that the defect in the execution of this power might be supplied.

The defendant, by his answer, alleged that in consenting to the act of Parliament and in petitioning the Rolls, he was entirely ignorant of the indenture of the 12th May, 1783, or the nature or effect thereof, and of the manner in which the power of sale was exercised, and the estate and timber conveyed.

Mr. *Pemberton* and Mr. *Cockerell* for the plaintiffs.

Mr. *Bickersteth* and Mr. *Lynch* for the defendant.

The court put the plaintiffs to their election to abandon the writ of error pending in the House of Lords from a judgment in the court of law. And Mr. *Pemberton* having elected so to do, the court allowed the cause to proceed.

[*442] *THE MASTER OF THE ROLLS :—This is a most unfortunate case; the plaintiffs and the persons under whom they claim have acted with perfect fairness and integrity.

The question in this cause is, whether the power of sale is or

is not well executed in the consideration of a court of equity, it having been already determined by a court of law that this power has not been well executed.

Powers generally require certain formalities in the mode of execution; and if there be a valuable consideration, this court will aid the defective execution of a power.

The first inquiry is, whether a trustee for the sale of an estate can convey it with the exception of the timber? The court of law has determined that no such conveyance can be made, and that this, therefore, is no execution of the power; and if it were competent to this court to give any opinion upon the subject, I must concur in the judgment which has been given at law.

The court of law has determined what is perfectly plain, that Sir Henry Charles Englefield could have no right to the sum of 2,448*l.*, the price of the timber; and that the conveyance by the trustee, Lord Cadogan, was, therefore, a conveyance which had no operation, as not being a conveyance under the power. In the opening of this case two grounds were taken upon which the plaintiff considered that he might be entitled to relief in a court of equity.

The first ground was, that prior to the conveyance so executed by Lord Cadogan and Sir Henry *Englefield, [*443] there had been an agreement in writing, which purported to be an agreement made on the part of Sir Byum Martin, not for the purchase of the land without the timber of Lord Cadogan and the timber of Sir Henry C. Englefield, but a contract made with Sir Henry C. Englefield for the purchase of the whole estate, including the timber; and it was contended that there being such an agreement in writing prior to the execution of the deed, that a ground might be found for correcting the deed, which did not give effect to the contract as stated. Unfortunately it appears to me that there was no such contract in writing, and that the argument, therefore, that was built upon the foundation of such a contract, must, in my view of the case,

totally fail. The next ground adopted in the argument was, that there was plainly here a mistake in the deed; that the deed was drawn contrary to that which was the real substance of the transaction. I perfectly agree that there is a great mistake in the deed; that is to say, that the parties to the deed have misapprehended the effect of the law which applied to this transaction; but a court of equity has no jurisdiction to correct a mistake in an instrument where the parties have proceeded upon error in point of law. The only jurisdiction a court of equity has for correcting mistakes in deeds, is where the drawer of the deed, the mere agent and instrument who has prepared the deed, has mistaken the intention of the parties to the deed. Now there is no ground to say that the parties to this deed had not that intention which is expressed upon this deed. This deed recites a contract made with Lord Cadogan for the purchase of the land with the exception of the timber. It recites a contract made with Sir Henry C. Englefield for the value of the timber.

[*444] It states the payment of the different *considerations, and contains upon the face of it an express acknowledgment by Lord Cadogan and Sir Henry C. Englefield respectively, that they did respectively receive the several considerations stated in the deed. I cannot consider, therefore, that this founded certainly on mistake, was founded on the mere mistake of the drawer of the deed. It was certainly the intention of the parties that this deed should be so framed, not from any mistake of the drawer, but because the parties misunderstood the nature of their rights. Sir B. Martin paid to Sir H. C. Englefield the amount of the value of the timber. He must have intended, therefore, to have received from Sir H. C. Englefield, the conveyance of that timber for which he paid. This, in truth, substantially disposes of the case.

It is said there are other grounds—the acquiescence on the part of Mr. Cholmeley, who came of age in 1804, and who, by notice from his agent, was informed of this transaction, and was informed that Sir H. C. Englefield had purchased as much stock as the 2,448*l.*, the value of the timber, would have produced at the time of the transaction. I take it for granted this was the

case, but did Mr. Cholmeley know that the effect of that transaction was, that there had been no valid execution of the power and that the estate remained subject to the trusts of old Sir H. Englefield's will? If he did not know this, the notice to him was wholly out of the question. No man can confirm a transaction prejudicial to his interest, unless he is apprised, not only of the fact but of the law. There is no pretence here to say, that Mr. Cholmeley, when he received the notice with respect to the facts, had the least information given to him, or the least knowledge that the effect of the transaction was to leave in him the benefit of *the remainder limited to him by [*445] Sir H. Englefield's will.

How can it be charged upon Mr. Cholmeley that he has been guilty of any acquiescence in point of time? His right accrued in 1822, and in 1823 a writ of *formedon* was issued, upon which he obtained the opinion of the court of law in his favor. In the year 1819, my Lord Cadogan being dead, and the heir at law, to whom the trusts under the will of Sir Henry Englefield descended, being a lunatic, it was thought proper, inasmuch as there were very large estates depending upon those trusts, to apply to Parliament in order to have new trustees appointed in the place of the lunatic heir. Mr. Cholmeley, in respect of his remainder in this estate, was called upon to join in the petition to Parliament for that purpose, and he accordingly joined, and he consented to the act of Parliament. Now, is it possible that Mr. Cholmeley's consent, in this manner, could affect his interest, unless he was at the time apprised of the error in law which had been committed, and which left that interest in him? I am of opinion, that, being at the time wholly ignorant of rights which were in him, his acquiescence operated nothing with respect to this defect. Now these are all the grounds upon which this case has been argued, and I am bound, therefore, to dismiss the bill; but considering the circumstances of the case, it would indeed be a great hardship to dismiss it with costs. The circumstances are perhaps the most hard that have ever been known to occur in any court of justice; and I am glad to hear from the counsel on the part of the defendant, that with respect to the return of

1830.—Hobson v. Neale.

the money paid, the defendant is disposed, without further litigation, to return the 12,500*l.*, and to pay *a proportion of the expense attending the appointment of new trustees, ratably according to the relative value of the property in question at the time at which it was sold.(a)

Decree that the plaintiff's bill be dismissed without costs.

Reg. Lib. 1829, A. p. 1534.

(a) Some further explanation took place as to this, and it appeared to be undertaken by the counsel for Mr. Cholmeley, that he should reinstate the purchaser, as far as he could, in the situation he would have been, had not the purchase been made; this, however, formed no part of the decree, and it was difficult to collect what was really intended, nor is it material to the principle of the decision.

HOBSON v. NEALE.

Vendor and Purchaser.—Title Deeds.

1830 : 15th February.

A purchaser entitled to title deeds having paid his purchase money into court, the court will not order the money to be divided, and the deeds to remain in the hands of the master until the completion of the sale of another lot.

THIS cause was set down by the plaintiff on further directions, for the purpose of obtaining an order of the court, that the purchase money, which had been paid into court by the purchaser of the largest lot, might be distributed amongst the parties entitled to the fund in the cause. The real estate had been advertised for sale in fourteen lots; the purchaser of the largest lot was to have possession of the title deeds, and to covenant to produce them. The fourteenth lot remained unsold.

Mr. *Wilbraham* for the plaintiff, contended, that the deeds ought to remain in the master's office until all the lots were sold, and that in the meantime this order might be made.

[*447] *Mr. *Barber*, for the purchaser of the largest lot,

1830.—Watkins v. Lewis.

argued, that it was not competent to the courts to make any such order, for that without the title deeds the purchaser would not have the full benefit of his bargain; and without them he could neither settle or mortgage satisfactorily. On the delivery of the title deeds to him he was quite ready to enter into covenants for their production, and to give an undertaking to enter into such covenant with the purchaser of lot 14, whenever it should be sold.

The MASTER OF THE ROLLS would not make any order, and gave the purchaser his costs.

ELIZABETH WATKINS AND VIRGINIA WATKINS, SPINSTERS, *Plaintiffs*; AND JOSEPH LEWIS, WILLIAM JONES, JOHN PRICE MARTIN, WILLIAM LUCAS AND SARAH JANETTA, HIS WIFE, RICHARD CONSTABLE, JOHN CONSTABLE, RICHARD OWEN STONE, WILLIAM OWEN STONE AND SARAH OLIPHANT, *Defendants*.

Settlement, ex provisione, viri.

ROLLS—1830: Wednesday, February 23.

Land purchased by the husband, subject to a mortgage, with the money of a half sister of the wife, was on her marriage settled on the husband and wife for their lives, and the life of the survivor of them, remainder to the heirs of the body of the wife, remainder to the right heirs of the husband. The husband having died, the widow and eldest son sold and conveyed part of the lands, and the son alone levied a fine. Many years afterwards, the son being dead, the widow also levied a fine.

Held, that the property was not within the spirit of the statute of 11 H. VII, c. 20; and that the plaintiffs, who were the issue of the second son, were barred by the fine, with proclamations of the widow.

By indentures of lease and release, dated the 28th and 29th January, 1755, between Elizabeth Hughes and Letitia Hughes, of the one part, and William *Watkins, of the [*448] other part, reciting that William Watkins had contract-

(a) *S. C.*, 1 Myl. & Cr. 371.

ed and agreed for the purchase of hereditaments called Gelly Vaur Gelly Vach, the Paint and the Pack House, in the county of Monmouth, for 2,480*l.* 10*s.*, and that he was thereout to pay a mortgage debt of 1,500*l.* thereon, and to pay 980*l.* 10*s.* to the said Elizabeth Hughes and Letitia Hughes, who, in consideration thereof, bargained, sold, released and conveyed unto the said William Watkins, his heirs and assigns, the same hereditaments and premises. A receipt is indorsed for the 980*l.* 10*s.*

By other indentures of lease and release, dated the 24th and 25th April, 1755, between the said William Watkins and Philadelphia, his wife, of the first part, Ann Constable, spinster, and sister-in-law of the said Philadelphia, of the second part, and Thomas Symons of the third part, reciting that the purchase was made by William Watkins, with the approbation of Ann Constable, who had advanced to him the sum of 980*l.* 10*s.* for the purchase thereof, upon condition that the said estates should be settled to the uses thereafter mentioned; he, William Watkins, granted, released and confirmed unto Thomas Symons and his heirs all the said estates and premises, to the intent and purpose that Ann Constable should, subject to the mortgage, receive a rent charge of 30*l.* per annum for her natural life out of the premises; and as to the fee and inheritance thereof, subject to the mortgage and annuity, to the use of William Watkins and Philadelphia, his wife, for their natural lives and the life of the survivor, with remainder, to the use of the heirs of the body of Philadelphia by William Watkins, with remainder to the use of the right heirs of William Watkins forever.

By indentures of the 23d and 24th June, 1758, to [*449] which William Watkins and Philadelphia, his *wife, were parties, after reciting that there was due for principal and interest upon the mortgage the sum of 1,600*l.*, and that Ann Constable had paid the same to the persons entitled thereto, all the said mortgaged premises were by the mortgagees conveyed to Ann Constable and her heirs, subject to a proviso for the redemption thereof by the said William Watkins and Philadelphia, his wife, or either of them, or by the heirs of either of

them, upon payment of 1,600*l.* and interest; and it was declared that upon payment thereof, Ann Constable should reconvey to the uses of the indentures of the 24th and 25th days of April, 1755. William Watkins and Philadelphia, his wife, thereby covenanted for the payment of the mortgage money and interest.

By other indentures, dated respectively the 6th and 7th May, 1760, William Watkins, in consideration of a release of the interest then due upon the said mortgage, and for other considerations therein mentioned, released and conveyed unto Ann Constable and her heirs all his estate and interest in the premises, but subject to the estate and interest therein of Philadelphia Watkins.

William Watkins, the husband of Philadelphia Watkins, died in her lifetime, and Edward Watkins, their eldest son, died in the year 1816, in the lifetime of Philadelphia Watkins, without issue, and John Watkins, the father of the plaintiffs, was the second son of Philadelphia Watkins by William Watkins, and he also died in the lifetime of Philadelphia Watkins, leaving the plaintiffs his only children and co-heiresses at law.

Philadelphia Watkins died on the 2d of February, 1823, leaving the plaintiffs the heirs of her body by William Watkins.

*Edward Watkins levied a fine of his property in [*450] Easter Term 18 G. III, whilst his mother was yet living, and by indentures of lease and release of the 14th and 15th days of December, 1780, Philadelphia Watkins and Edward Watkins, and the devisees and executors of Ann Constable, conveyed the Gelly Vaur, part of the property in the settlement, to James Jenkins and his heirs.

In Hilary Term, 1822, Philadelphia Watkins levied a fine of the Gelly Vaur, and the uses thereof were declared to Jenkins in fee.

By indentures of lease and release of the 22d and 23d days of

June, 1813, the same persons conveyed the Pant, other part of the property in the settlement, to John Price in fee. John Price, by another deed, demised the same to Edward Watkins for 500 years, to secure the payment of 2,500*l.*, part of the purchase money and interest.

By indenture dated the 20th of September, 1822, between Philadelphia Watkins of the one part, and John Price of the other part, reciting, amongst other things, that it had been then lately ascertained, that at the time of the execution of the indentures of the 22d and 23d of June, 1813, Philadelphia Watkins was seised of or entitled to, amongst other hereditaments, the messuage or tenement and farm called the Pant, and the yearly sum of 4*l.* 5*s.* 2*d.* for an estate or interest in tail under or by virtue of the uses or limitations contained in the indenture of release of the 25th April, 1755, and that inasmuch as the fine so levied in the 18 G. III, was levied by Edward Watkins, in whom the remainder or reversion of such estate tail was [*451] vested, (a) and not by *Philadelphia Watkins, it had been deemed expedient, for the purpose of barring or extinguishing the estate or interest in tail of Philadelphia Watkins of and in the said hereditaments, and of establishing and confirming the title of John Price and his mortgagee thereunto, that a fine should be levied by Philadelphia Watkins, and she thereby covenanted to levy a fine *sur consuance de droit come ceo*, &c., with proclamations, of the premises comprised in the indentures of the 22d and 23d June, 1813. And it was declared that the same should enure to the use and intent, in the first place, to establish and confirm the term of 500 years granted or demised to Edward Watkins, his executors, administrators and assigns; and subject thereto, to John Price in fee.

The last mentioned fine was levied by Philadelphia Watkins in Trinity Term, 3 G. IV.

Mr. *Bickersteth*, Mr. *Preston* and Mr. *Jacob* for the plaintiffs:—

(a) Philadelphia alone was seised in tail. During her lifetime the issue were not seised at all, and Edward having died in her lifetime, he never had any interest at law or in equity.

The first question is, whether this was a provision made by William Watkins for his wife and family?

Secondly, whether Philadelphia Watkins has properly alienated this property?

And, thirdly, whether the purchaser had notice?

As to the first question, whether this was a purchase by the husband so as to make it an estate tail within the statute, or whether Ann Constable was the purchaser of the equity of redemption? It is clear that the property was contracted to be purchased by Watkins, and it is a purchase by the husband, so as to make it a provision *moving from the husband. [*452] Watkins was bound to pay the purchase money. Suppose the wife had died the day after the contract, must not Watkins have paid the purchase money? his personal representatives could not have refused to pay it. It is not sufficient to show that Mrs. Constable paid the purchase money in consideration of the settlement; but it must be shown that she purchased the equity of redemption in fee.

Now, suppose Mrs. Constable had become bankrupt, could her creditors, under the then bankrupt laws, have recovered the estate, or the money which had been paid for it? they certainly could not.

This is not the purchase of an equity of redemption, but the purchase of the estate.

Most of the cases on this subject are collected in Viner's Abridgement, under the head Jointure and Jointress,^(a) and the case of *Simson v. Turner*,^(b) decided by the Lord Keeper in Trinity Term, 1700. In Cruise on Common Recoveries they are collected.^(c) If husband and wife are joint tenants, and settle—as

(a) Vol. XIV, 549.

(b) 1 Eq. Ca. Ab. 220; also in Viner, 555.

(c) *Stockbridge's Case*, Cro. Eliz. 24.

1830.—*Watkins v. Lewis*.

to one moiety, it is the settlement of the wife, and as to the other moiety, of the husband.

There is a case also in *Dyer*,^(a) where the husband and wife were, under their marriage settlement, joint tenants in tail; there the father of the wife covenanted in the settlement to pay 70*l.*, the wife survived and levied a fine which was adjudged to be against the statute; the report states, that the settlement [*453] was as well in consideration *of the marriage as the money. Now this case shows, that although part of the money be paid by a friend of the wife, that payment does not take the case out of the statute.^(b)

If an estate be purchased where the consideration moves partly from the husband or his family, and partly from the wife or her family, the whole is subject to this statute; otherwise a difficulty would arise in covering the parts to be within the statute, from those not within it, according to the consideration paid by the parties. In *Stockbridge's Case*,^(c) the husband and wife were previously entitled to the copyhold; the husband purchased the freehold, yet the court considered it merged and bound by the statute, *Symson v. Turner*.^(d)

As to the second question, the conveyance to Jenkins contained a declaration that all fines, and particularly the fine of 18 G. III, should enure to the purchaser. It was founded on the fine of Edward Watkins alone, without the widow—the widow being then tenant in tail in possession. Edward died in 1816, and his death terminated his interest in the property, and of all persons who could claim under him. John had died before. Upon the death of Edward without issue, the plaintiffs were heirs in tail in remainder expectant on the death of Philadelphia, the mother.

(a) *Villiers et Beaumont*, Lincoln, Dyer, 146 a, Easter Term, 4 & 5 P. & M., and 14 Vin. 551. The grandfather and grandmother of the husband settled the lands in this case.

(b) *Piggott v. Palmer*, Moore, 250. But see the cases of *Eyston v. Studd*, Plowden's Commentaries, 463; *Copland v. Platt*, Sir William Jones' Rep. 224, and Cro. Car. 244; 14 Vin. 551, pl. 6.

(c) *Ante*, 453.

(d) 1 Eq. Ca. Ab. 220.

In 1822 Mrs. Watkins levied a distinct fine of the Pant estate, and executed a deed to confirm the title to the premises formerly conveyed to Mr. Price. Now, *the fine levied [*454] by Edward alone could not operate upon the estate of his mother; and if the mother had her estate tail *ex provisione viri*, she could not alien without the concurrence of the next heir of the inheritance.

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By the act of the 11 H. VII, c. 20, the fine levied by the son must be part of the same transaction with the fine levied by the mother, and the two fines cannot be combined. By this statute it is provided, that it shall not extend to a recovery where the heirs next inheritable to the woman, or he that, after her death, shall have the inheritance, be assenting or agreeable to the recoveries, where the same assent or agreement is of record or enrolled.

The party must join in the very fine, or the deed whereby the assent is given must have been enrolled as part of the same transaction.

The two fines together cannot effect the object. In *Seymour's Case*,^(a) the tenant in tail made a bargain and sale, and afterwards levied a fine. This was held not to be a discontinuance, because the bargain and sale and fine were not parts of the same transaction. In *Herring v. Brown*,^(b) it was admitted, that if a man having a power, levy a fine, and afterwards by deed execute the power, the fine destroyed the power. The fine of the son cannot, after his death, be used as a consent to the fine of the mother. She was, for the purpose of her sole alienation, no more than a mere tenant for life.

Inasmuch as Edward was dead without issue when Philadelphia levied her fine, that fine is within the *statute of Hen. VII; and the fine of Edward, he having died in the lifetime of Philadelphia, was worth nothing; but had

(a) 10 Co. Rep. 96.

(b) 1 Vent. 368-371.

1830.—Watkins v. Lewis.

he survived, then, by force of the statute 11 Hen. VII, if proclamations were made, his fine would have been an effectual bar. When tenant in tail hath two sons, and the eldest son levies a fine with proclamations; and the father dies leaving that son, or any descendant of that son, inheritable to the tail, the fine will bar; but if the first son dies without issue in the lifetime of his father, the second son or his issue are not barred. Edward Watkins, when he levied the fine, had no interest in the property, but had he survived his mother, the fine would have bound him and his issue by estoppel.

As to the third question. The purchaser had notice of the settlement(a) through the deed of 1780, which set out that settlement. The legal estate is outstanding, therefore, the only remedy the plaintiffs have is in this court.

Mr. Tinney and Mr. Wrottesley for John Price:—This is a bill filed for redemption of the mortgage; and we maintain that this was a settlement of the equity of redemption which was paid for, not by the husband, but by Ann Constable, the half sister of the wife, and not a settlement proceeding from the husband *ex provisione viri*. The whole purchase was a purchase of the equity of redemption for 980*l.* 10*s.* Then follows the settlement upon which all this question arises; and it is stated therein that she had advanced the whole consideration for the purchase thereof, upon condition that it should be settled as thereafter mentioned.

[*456] *Now the statute of 11 Hen. VII, only applies when the property moves from the husband. We admit it is not necessary that the whole should move from him.(b) To bring the case within the statute, it must be shown that the estate moved from the husband. The value of the estate, it being an equity of redemption, was 980*l.* 10*s.*; that was the whole consideration, and that was paid by Mrs. Constable. In the cited case of *Simson v. Turner*,(c) the lands were given by the husband's ancestors.

(a) Mr. Tinney admitted this.

(a) *Ward v. Wallthew*, Cro. Jac. 173; *Copeland v. Piott*, ante, 454; *Kynaston v. Lloyd*, Cro. Jac. 624; *Eyslon v. Studde*, ante, 454.

(b) *Ante*, 454.

It is said that part of the consideration came from Watkins, because he became liable for the mortgage money; but if a tenant for life pays off a mortgage, he keeps it subsisting, and is entitled to it: the property is expressly conveyed, subject to the mortgage for 1,500*l.* In 1758 Mrs. Constable paid off the mortgage money. Watkins had not kept down the interest; and Mrs. Constable paid off principal and interest, and took a covenant from Watkins, that he and Philadelphia, his wife, or their heirs, would pay it off; but this cannot affect the transaction of 1755. After this she took a conveyance of his life interest, and released him from all responsibility in respect to the mortgage. All these circumstances show what the transaction was. Now it is said that this statute would protect not only the issue, but the other persons taking under the settlement; but Mr. Watkins has conveyed all his interest to Ann Constable; and her devisees, with Philadelphia and Edward, joined in the sale; and if this case be within the statute, has not the statute been satisfied? Edward at that moment was the person "next heritable" to the said woman. In the *conveyance Philadelphia Watkins entered into a covenant for further assurances. The next heir assented to a conveyance by her of those lands, and he was the person whom the statute meant to protect. The purchaser called upon Philadelphia Watkins, on her covenant for further assurances, to levy a fine, and she did so. It is not required that the next person entitled should join, but should assent. His assent is here of record; and that takes the case out of the statute. Where can be the difference whether Philadelphia Watkins levied the fine at the time of the assent or afterwards? *Villiers v. Beaumont.*(a) But if Philadelphia be an ordinary tenant in tail, her fine is a sufficient title.

Mr. *Treslove* and Mr. *Duckworth*, for Lucas and wife, and Oliphant, mortgagees of Price:—What was the object of the party who made the settlement? The object of Ann Constable was to provide for the issue of her sister. *Copeland v. Pigott.*(b) The

(a) *Ante*, 453.

(b) *Ante*, 454.

question is, whether the settlement comes from the husband: if it does, then it is within the statute.

Do the cases which have been cited compel the court to come to the conclusion which the plaintiffs seek to attain? Certainly not: all the cases cited are either of marriage alone, marriage with money, or the lands moved from the husband or his ancestors.^(a)

In a case in which husband and wife were joint tenants, and the wife levied a fine, his part was held to be within the statute, but the other was not so. In the case of *Copland* and [*458] *Piott* the 140*l.* was a marriage *portion. In the *Bishop of Exeter's Case*, where the consideration was the property of the husband, and he conveyed to husband and wife in tail, yet that was held to be not within the statute. It is true, it there appeared that the wife was a cousin of the bishop. Now, although the conveyance was to Watkins, yet, if it appeared that the purchase was originally made for the wife's friends, that trust would have its effect. The settlement overrides the whole transaction from the very beginning.

Mr. *Pemberton* and Mr. *Turner* for a trustee.

Mr. *Bickersteth* in reply:—If this case is not within the statute I admit that the fine of Philadelphia Watkins in 1822, established the defendant's title. The fine levied by Edward ceased to have effect on his death. It is said, that the fine levied in 1778, by Edward, can be connected with the fine of Philadelphia in 1822. I admit that if Edward, or any issue of his had been then living, it would have had effect, although no authority has been produced to show that it would. In *Hawkins v. Kemp*,^(b) a case as to powers, it was held, that the defect of one deed could not be supplied by another; and the principle of it applies to this case. The fine of Edward only operated by way of estoppel to himself, and his issue. There is nothing to show that the covenant in 1780, is connected with the fine of 1822.

(a) *Dinaston v. Lloyd*, Palmer, 213.

(b) 3 East. 410.

The fine of Edward cannot be considered that species of agreement or consent upon record which the statute *re- [*459] quires. I contend that the case is within the statute. The conveyance is to Watkins and his heirs alone, and he was possessed of it as his own estate, subject to the mortgage then outstanding. If Mrs. Constable had been the purchaser, she would have had to pay the mortgage; but Watkins was the person who was to pay the mortgage money, and he was to pay Mrs. Constable an annuity for her life. Mrs. Constable took an assignment of the mortgage, but took Watkins' covenant to pay it. The statute was framed for the purpose of preventing a wife, who had acquired an estate from the provision of the husband from disposing of it. That statute has been construed liberally in favor of the cases which come within the principle, although not within the letter. There is not, I admit, a case exactly similar to this, but there are cases involving the same principle. One of the considerations given to the husband was a sum of money. It is not the money consideration given by the friends of the wife that will take the case out of the statute.

March 9th.—THE MASTER OF THE ROLLS:—This is a settlement of the equity of redemption only. If William Watkins had paid off the 1,500*l.* he could have kept it on foot against the settlement. The whole consideration for the equity of redemption was paid by the sister of the wife.

This case is in words within the statute, as the estate was in words and in strictness of law a purchase by the husband. But it is equally clear, that it is not within the spirit or the equity of the statute. The statute was made to prevent a widow from parting with an estate tail actually coming from the husband or his ancestors to the disherison of his heirs; but this equity of redemption, *the only property settled, never [*460] came from the husband or his ancestors, but was provided substantially and entirely by the wife's sister. Now it has been decided several times, (if anything could be wanted for such a point,) that a case, though within the words of the statute, may not be within the spirit; and this is one of the cases not within

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the spirit of the statute. And I am of opinion, therefore, without adverting to the other circumstances of the case, that this bill must be dismissed, and with costs.

Reg. Lib. 1830, B. p. 1196.

LIVESEY v. HARDING.—LIVESEY v. BECKETT.

Heir at Law.—Practice.—Cross Remainders.—Trustee.

ROLLS.—1830: 8th July.

An heir at law, in his answer to a bill to establish a will, admitted that the will was well executed, and the sanity of the testator. The heir died, and the bill was revived against his brother, who disputed the execution of the will and the sanity of the testator.

Held, that the court would not allow him to do so.

A gift to daughters and the heirs of their bodies, as tenants in common; and if only one, to such only daughter and the heirs of her body, with remainder to the testator's right heirs.

Held, that there were cross remainders between the daughters.

The testator having directed his two trustees to apply a moiety of rents, or such part as they or he should in their or his discretion see fit, in the maintenance and education or advancement in life of his younger children during the life of his wife, and one of the trustees having died, the court would not interfere with the discretion to be exercised by the surviving trustee.

THIS was a suit to establish the will of Edward Livesey, whereby he devised his real and personal estates unto the defendants, William Harding and John Harding, their heirs and assigns, upon trust, after certain payments, to pay and apply a moiety of the residue of the rents and profits, or such part of a moiety as they or he in their or his discretion should see fit, in the main-
 [*461] tainance, education, bringing up, or advancement in *life of his younger children or child, and the issue of such of them as should die in the lifetime of his said wife, as to them or him should seem eligible during the natural life of his wife; and subject to that and some other payments, he gave and devised his estates unto his said trustees, their heirs and assigns,

to the use of his eldest or only son for and during the term of his natural life; remainder to the said trustees to preserve contingent remainders; and from and after the decease of his said son, to the use of such child or children, or remoter issue of his said son, as he should appoint in the manner in the said will mentioned, and subject thereto, to the use of the first and all and every other son and sons of his said son in tail in succession; remainder to the daughter and daughters of his said son in tail; and in default of such issue of his said son, to the use of all and every the daughter and daughters of him the said testator, and the heirs of their bodies, to take as tenants in common, if more than one, equally, and if but one, to the use of such only daughter of him, the said testator, and the heirs of her body forever; and for default of such issue, to the use of his heirs forever.

The testator appointed his trustees guardians of his children, and executors of his will.

He left Edmund Worthington Livesey, his eldest son and heir at law, and Mary Carter Livesey, James Worthington Livesey, Harding Livesey and Eliza Armstrong Livesey, his only younger children.

The bill prayed that the will might be established.

Edmund Worthington Livesey, the heir at law, by his answer, said, that the will was not made according to the instructions and intentions of the testator, it being *his intention, that on failure of issue of the eldest son, the property should go to his younger sons, and their issue successively before the daughters; but this defendant admitted that the testator was in a sound state of mind when he executed his will, and that the same was duly executed as by law is required for passing freehold estates. [*462]

James Worthington Livesey, by his answer, disputed the will, alleging that the same was not made agreeably to the instructions given by the testator, and said that the testator was ad-

 1830.—*Livesey v. Harding.*

the spirit of the statute. And I am of opinion, therefore, without adverting to the other circumstances of the case, that this bill must be dismissed, and with costs.

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Held, that there were cross remainders between the daughters.

The testator having directed his two trustees to apply a moiety of rents, or such part as they or he should in their or his discretion see fit, in the maintenance and education or advancement in life of his younger children during the life of his wife, and one of the trustees having died, the court would not interfere with the discretion to be exercised by the surviving trustee.

THIS was a suit to establish the will of Edward Livesey, whereby he devised his real and personal estates unto the defendants, William Harding and John Harding, their heirs and assigns, upon trust, after certain payments, to pay and apply a moiety of the residue of the rents and profits, or such part of a moiety as they or he in their or his discretion should see fit, in the main-
 [*461] tainance, education, bringing up, or advancement in *life of his younger children or child, and the issue of such of them as should die in the lifetime of his said wife, as to them or him should seem eligible during the natural life of his wife; and subject to that and some other payments, he gave and devised his estates unto his said trustees, their heirs and assigns,

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James Worthington Livesey, by his answer, disputed the will, alleging that the same was not made agreeably to the instructions given by the testator, and said that the testator was ad-

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dicted to excessive intemperance, and was in a state of derangement, and utter incapacity to manage his own affairs, except at times.

The bill was replied to, and further proceedings had therein.

Edmund Worthington Livesey, died unmarried, leaving the plaintiff, Mary Carter Livesey, the only surviving daughter of the testator, Eliza Armstrong Livesey, the other daughter having died before E. W. Livesey, without issue.

The suit was revived, and James Worthington Livesey, the eldest brother and heir at law of E. W. Livesey, and also heir at law to the testator, in his answer to this bill of revivor, said, that since the filing of the original bill he had discovered, and verily believed the truth to be, that Edward Livesey, at the time of making his will, was not of sound mind, memory and understanding, or, at any rate, that he was acting under an undue influence, exerted over him by the defendants William Harding and John Harding, and by Archibald Keightley, the elder, the solicitor and brother-in-law of the defendant John Harding.

[*463] *Mr. *Agar*, Mr. *Preston* and Mr. *Duckworth* for the plaintiff, cited *Tucker v. Phipps*.(a)

Mr. *Treslove* and Mr. *Ward* for Mr. Livesey, cited *Sleeman v. Sleeman*,(b) and *Cartwright v. Cartwright*.(c)

THE MASTER OF THE ROLLS:—The heir at law has admitted the will to have been well executed, and the sanity of the testator at the time of making the will. Has anything occurred to authorize the court to relieve him from the admission? Must not the court infer that the heir at law had made every necessary inquiry in order to obtain information before he made the admission? Is it possible, then, to allow a succeeding heir to dispute

(a) 3 *Atkins*, 359.

(b) 2 *Dickens*, 787.

(c) 2 *Dickens*, 545.

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the will? I cannot follow the cases that have been cited. Mr. Dickens was not a very accurate reporter. The brother is bound by the admission made by the heir at law. I cannot direct an issue *devisavit vel non*, but Mr. Livesey is entitled to make what use he can of the question of construction.

Declare one moiety of the rents and profits to be applied to the maintenance of the younger children during the life of the wife.

The application of it is left to the discretion of the trustees, as they or he shall think fit. I could only make a declaration in the words of the will. One of the trustees is living. The discretion is vested in the surviving trustee.

Mr. Agar then, on the question of cross remainders, cited *Watson v. Foxon*,^(a) *Green v. Stevens*.^(b) One of the daughters, who survived the testator, is dead, and *accord- [*464] ing to the doctrine of cross remainders, the whole is now in the surviving daughter.

Mr. Preston:—There is sufficient in the will for cross remainders. Cross remainders are, from the words in default of such issue, or any like expression, to be implied between two, but not where there are more than two; but if there be a gift to a class of persons, the rule of cross remainders applies. This is a gift to a class of persons who may be more or less than two.

Mr. Treslove contended, that there was no ground for inferring cross remainders.

THE MASTER OF THE ROLLS:—The gift over here is in default of issue; that is what I most rely upon.

July 16th.—THE MASTER OF THE ROLLS:—The question is,

(d) 2 East, 36.

(e) 17 Ves. 64.

 1830.—Dawson v. Hearn.

whether any part of the estate should go over so long as there is issue of any of the daughters? I think the cases upon this subject have been very absurd in drawing the distinction, that cross remainders should be implied when there are only two, but not when there are more than two. I own I am of opinion that no part of this estate is to go over as long as there are issue of any one of the daughters.

The cause then stood over for judgment to the following Monday.

July 19th.—THE MASTER OF THE ROLLS:—In this case the testator had limited his estate in remainder to his daughters in tail, and if but one, then to her in tail; and in default of [*465] such issue, then to his own right heirs. I am of *opinion that no part of the estate goes over until there be a general failure of issue of all the daughters; and, consequently, I hold there are cross remainders between them.

Decree, that according to the true construction of the will, there were cross remainders between the two daughters of the testator, and that Mary Carter Livesey, the surviving daughter, is entitled to the whole estate of the testator as tenant in tail thereof.

Reg. Lib. 1830, B. 2497.

DAWSON AND OTHERS v. HEARN AND ANOTHER.(a)

Will.—Annuity.

WESTMINSTER HALL.—1830: 14th June.

A testator directed that an annuity of 250*l*. should be purchased for his wife within three months after his decease. She survived him seven months, but the annuity had not been purchased at the time of her death. Her personal representatives filed their bill for payment of the value of the annuity at the time at which the testator had directed it to be purchased, and the court decreed accordingly.

But if an annuitant has received the annual sum, the court will direct an inquiry whether the annuitant elected to take the annuity from the person who was directed to purchase it, instead of the principal sum.

(a) *S. C.*, 1 RUS. & M. 608.

WILLIAM HEARN, by his will, bearing date the 7th day of September, 1823, *inter alia* gave and bequeathed as follows: "I also direct, that from and out of my moneys and personal estate, an adequate sum be, within three calendar months next after my decease, laid out and invested in the purchase of a government annuity of 250*l.* per annum, in the name and for the use of my said wife during her life; and I further will and direct, that in case my personal estate shall prove insufficient to purchase, and pay and satisfy the annuities and several pecuniary legacies hereinbefore by me directed and given, I charge and make subject my said estate at Singleborough with and to the deficiency therein. *All the rest and residue of my personal [*466] estate I give to my brother, William Hearn, to be disposed of amongst his children and grandchildren, as he may think fit; and I nominate and appoint my said brother, William Hearn, and nephew, Thomas Hearn, executors of this my will."

The testator died on the 28th day of April, 1827, and his wife died in November following, having previously bequeathed her personal estate to her two sisters, one of whom is a plaintiff to this suit, and the other sister has since died, leaving the other plaintiff her executor.

The annuity was not purchased. The bill stated the preceding facts, and prayed that it might be declared that the plaintiffs were entitled to be paid from the assets of the testator, such sum of money as would have been required at the expiration of three months after his decease, to purchase a government annuity of 250*l.* during the life of Susannah Hearn, the widow of the testator, with interest thereon from that time. The defendants, by their answer, said that no sum of money was ever invested in the purchase of an annuity for the said Susannah Hearn, deceased, or paid to her in respect of the sum required for the purchase of the annuity of 250*l.* in the said bill mentioned; for that, at the death of the said testator, his assets consisted principally of money out on securities, which could not be immediately got in, and that at the end of three months after the death of the

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said testator, they had not possessed assets sufficient to purchase the said annuity, and that the funds were then very high, and that the health of the said Susannah Hearn was then very precarious, and the defendant, Thomas Hearn, who principally acted in the executorship, therefore informed the said Susan-
 [*467] nah Hearn of his intention to postpone the *purchase of the said annuity, and told her, he doubted not that she would feel satisfied with the security of the said William Hearn (his father) and himself, as executors of the testator, for payment of the said annuity in the meantime, or to that effect; to which she made no objection; and the defendants admitted sufficient assets to purchase the annuity.

Mr. *Bickersteth* and Mr. *Swanston* for the plaintiffs:—Had a sum of money, equal in value to the annuity, been given to Mrs. Hearn, it would have vested in her; and the ground on which the court gives the representatives of an annuitant what the purchase would have cost is, that the annuitant might, when the annuity is purchased, sell it if she pleases. The reasoning of the answer, that the stocks were high, could not deprive her of her rights. *Palmer v. Crawford*,(a) *Bayley v. Bishop*,(b) *Yates v. Compton*,(c) *Barnes v. Rowley*.(d)

The bequest of a sum for the purchase of an annuity entitles the legatee to the specific sum. When the time arrived (three months) it was clearly ascertained what sum was requisite, and by the bequest Mrs. Hearn became entitled to a legacy equal to the sum which would have been requisite to purchase the annuity at the end of three months from the death of the testator.

Mr. *Pemberton* and Mr. *Turner* for the defendants:—Where there is no bequest of a principal sum, but only of an annuity, the principle contended for cannot apply. The pur-
 [*468] chase of an annuity depends upon the *health of the annuitant, and other circumstances may influence the value.

(a) 3 Swanst. 482.
 (b) 9 Ves. 6.

(c) 2 P. W. 309.
 (d) 3 Ves. 305.

1890.—*Dawson v. Hearn*.

Suppose the executors had purchased the annuity some months after the expiration of the three months, and stocks in the meantime had fallen, would the executors have been liable for the difference? A passage has been read from the answer explaining what the circumstances were which prevented the purchase of the annuity, and that the annuitant did not object to the security of the testator's estate, and to receive the annuity from it. It is plain from this will, that the testator meant that this should be an annual provision for the wife. He gave her other legacies. Can it be said, that as she did not choose to make her election to have the annuity purchased, her representatives can elect now?

All the cases, except that of *Sales v. Compton*, are bequests of principal sums. In that case, Jane Stiles, the annuitant, was entitled to the whole produce of the real and personal estate; and the question was, whether the estate did not remain unconverted? The decision was that the realty was converted. The cases cited do not apply.

The testator meant to make a provision for his wife for her life. Now what is the practice of the court? It sets aside a sum to answer the annuity. The only exception is an insolvent estate, in which the court has directed an annuity to be purchased in the government securities. Now, if a party makes no claim, but submits to receive the annuity, the representatives of that party cannot quarrel with the acts of the person whom they represent. The party who had the power has *entered into the arrangement, and her representative [*469] cannot quarrel with it.

THE MASTER OF THE ROLLS:—It can make no difference whether a certain sum is given to purchase an annuity, or a certain annuity is directed to be purchased; and the court considers it a legacy to the amount of its value: but the annuitant may waive it, and receive the annual sum from the executors.

In a case which occurred last term,(a) the annuitant had received the annuity for some time, and I directed an inquiry, whether she had elected to take the annuity, but here, it is not contended by the answer of the executors that the annuitant waived the right of having the annuity purchased; the answer states that they proposed to postpone the purchase. On the part of the annuitant, it was at most but a mere assent to a proposal to receive the annuity until the purchase was made, and consequently she still continued entitled to the sum which would have been requisite for the purchase of the annuity, and her representatives are now entitled to that sum.

[*470] *It does not appear that the executors communicated their reasons to the annuitant.

Let the master inquire what sum would have been required at the expiration of three months from the death of the testator to purchase a government annuity of 250*l.* during the life of Susanah Hearn; and declare that the plaintiffs are entitled to the sum that would have been so required, with interest at 4*l.* per cent., and that the defendants pay unto the plaintiffs the said sum and interest, with their costs.

Reg. Lib. 1830, A. p. 1902.

(a) BROWN v. ROSS.

6th May:

This suit was on a direction in a will, that a sufficient sum should be set apart for the purchase of an annuity of 750*l.* The defendant, by his answer, stated that he had from time to time paid the annuitant the growing payments of the annuity during her life, and that such payments were received by the annuitant in full satisfaction of the annuity. The court directed an inquiry, how it happened that the annuity was not purchased, and whether the widow assented; with liberty to state special circumstances.

The report is nearly ready, and this case will shortly be heard on further directions.

CHARLES MARRIOTT, *Plaintiffs*; AND THOMAS SNEYD KINNERSLEY, THOMAS MEGGISON, CHARLES KAYE AND JOHN WESTCOTE BAMPFIELD AND ELIZABETH, HIS WIFE, MARY MEGGISON, WIDOW, JOHN MIDDLETON MEGGISON, AND HENRY CUBITT, *Defendants*.

Trustees.—Liability for Acts of Co-Trustees.

ROLLS.—1830: 7th July.

Trustees of stock signed a power of attorney to sell it out, and the proceeds were received from the broker by one of the trustees, who afterwards became insolvent. Decree, that the other trustees account for and pay the amount.

ELIZABETH MARRIOTT, the mother of the plaintiff, sold out some East India bonds which had been given to her by the defendant Kinnersley, and invested the produce in the purchase of 3,620*l.* 3*s.* 4*d.*, three per cent. consols, in the names of defendant Kinnersley, defendant Charles Kaye, and defendant Thomas Meggison, and caused to be effected on the 24th of February, 1814, with the Equitable Insurance Company, a policy of insurance for 2,000*l.* on her life. By indenture bearing date 7th of May, 1815, made between Elizabeth Marriott of the one part, and those three *defendants of the other part, [*471] Mrs. Marriott assigned the policy to the three defendants, and it was thereby declared that they should stand possessed of the 3 per cent. consols, and the dividends thereof, and the policy of insurance, upon trust to vary the stocks, and out of the dividends from time to time to pay the premium of insurance, and to apply the whole or such part as they should think fit of the residue in the maintenance and education of the plaintiff until he should attain twenty-one, and to invest the surplus; and on the plaintiff coming of age to transfer the whole to him. In this deed there was a proviso that the trustees should not be answerable for any misfortune, loss or damage in the execution of the trusts, except the same should happen by or through their own wilful default respectively. The payment of the premium on the policy was discontinued in 1819.

The trustees executed a power of attorney on the 9th of May,

1819, enabling Henry Vigne and Frederick Vigne to sell out the stock. The produce was received by the defendant Charles Kaye, who afterwards became insolvent.

The defendant Kinnersley did not execute the trust deed.

The bill prayed that it might be declared that the defendants Kinnersley, Meggison and Kaye, had committed a breach of trust, and that they should replace the stock and dividends, and the policy of insurance.

The defendants Kinnersley and Meggison never received the dividends, nor interfered in the trusts, further than that Meggison executed the deed and power of attorney, and Kinnersley the power of attorney only.

[*472] *Defendant Kinnersley stated in his answer, that he had no knowledge of the deed, to which he never assented that he should be made a party, and that he had not in any manner authorized any person to name him a trustee therein; that he never executed or saw the deed, or any draught or copy thereof, or consented to become a trustee thereunder; nor did this defendant know, nor had he reason to believe, that any trusts had been declared in favor of the plaintiffs; this defendant also said, that he refused to allow the stock to be purchased in his name, and that not knowing that the stock was invested upon any other trust than for Mrs. Marriott, and believing she had the entire control of it, he did, at the request of the defendant Kaye, who was her solicitor and agent, execute the power of attorney, which he delivered to the defendant Kaye.

The defendant Meggison died, and the bill was revived against his representatives.

It appeared that the application of the defendant Kaye, to the defendant Kinnersley, to execute the power of attorney, was by letter, wherein occurs this passage: "it becomes necessary for the advancement of Charles Marriott, the plaintiff, that the stock should be sold out."

1830.—*Marriott v. Kinnersley*.

Mr. *Pemberton* and Mr. *Beames* for the plaintiff:—Mr. *Kaye* having determined to appropriate the stock to himself, wrote a letter to Mr. *Kinnersley*, desiring him to execute a power of attorney. Mr. *Kinnersley* incautiously executed the power of attorney. A person who is appointed trustee with his consent, can only discharge himself by applying the fund as the *cestui que trust* may direct, or by transferring it to other [*478] persons by the direction of the *cestui que trust*. He has acted, and is therefore liable.

Mr. *Meggison* signed the deed, and he was bound to see to the proper application of the funds. He chose to trust to Mr. *Kaye*, and his estate must answer for the loss sustained. Mr. *Kinnersley* says in his answer, that he had no distinct notice of the trust reposed in him; but the letter of Mr. *Kaye* is evidence that he had notice, for there he calls upon him to join in an act for the purpose of raising money, which was represented to him to be in conformity to the trusts. The very act of transferring was such an act as amounted to an acceptance of the trusts.

Mr. *Barber* for a defendant in the same interest.

Mr. *Tinney* for Mr. *Kinnersley*:—Mr. *Charles Kaye* was the confidential solicitor of Mrs. *Marriott*, now Mrs. *Bampfylde*, and he informed Mr. *Kinnersley* that the funds were transferred into his name. Now Mr. *Kinnersley* knew of no trust deed, nor of any trust, but for Mrs. *Marriott*. *Charles Marriott* was only a natural son of Mrs. *Marriott*; and a person who creates a voluntary trust may discharge it, this was decided by Lord *Eldon* in the case of *Walwyn v. Cooke*,^(a) and therefore I ask your Honor to direct an inquiry whether Mrs. *Marriott* did any act by which the trusts might be discharged; by which Mr. *Kinnersley* might be discharged from these trusts.

Mr. *Wright* with Mr. *Tinney*:—This trustee was not liable to the acts of the other trustees. *Bacon v. Bacon*.^(b) Trus-

(a) 3 Mer. 707.

(b) 5 Ves. 331.

 1830.—*Marriott v. Kinneraley*.

[*474] tees *are not liable to the consequences of anything they do for the sake of conformity. *Hovey and Blake-man*,(a) *Chambers and Minchin*.(b)

Mr. *Bickersteth* and Mr. *Swanston* for the representatives of Mrs. Meggison :—Unfortunately the question is too clear ; and the only question is as to the consequences : the money is gone by the fraud committed by Mr. Kaye, but Mr. Kinnersley's liability is as great as Mr. Meggison's.

THE MASTER OF THE ROLLS :—Mr. Meggison chose to confide in Mr. Kaye contrary to his duty, and he must suffer for Mr. Kaye's neglect or default. Mr. Kinnersley's case is very hard, but the question is, whether Mr. Kinnersley has not incautiously done an act which has placed this property in the hands of individuals who have abused it. Mr. Kinnersley will be charged with no dividends prior to his *acting*, nor will he be charged with the loss sustained by the neglect about the policy ; he is only liable to the fund transferred, but Mr. Meggison's representatives must be charged with a general breach of trust, with the loss sustained by the discontinuance of the policy, and must pay costs. But I will not charge Mr. Kinnersley with costs, I give the costs against the executors of Mr. Meggison and against Mr. Kaye.

With respect to what the counsel for Mr. Kinnersley has said about Lord Eldon's doctrine, he has mistaken it. If there be communication between a trustee and a person for whose benefit a trust is created, then the trustee is liable to him ; but

[*475] he is only not so when *there is not that communication ; this applies to conveyances upon trust for creditors.

The stock itself must be replaced.

Reg. Lib. 1829, B. p. 2712.

(a) 4 Ves. 595.

(b) 4 Ves. 185.

(c) 7 Ves. 421.

1830.—Winter v. Hicks.

WINTER v. HICKS

Debt due to Administrator.—Intestate Trader.—Costs.

1830.—15th February.

An administrator having claimed his debt before the master, that is sufficient to entitle him to retain it.

The administrator entitled to his costs out of the produce of the sale of a real estate, his intestate having been a trader.

The heir at law entitled to his costs from the plaintiff, who may be reimbursed out of the fund in court, without prejudice to the costs of the administrator.

THIS was a suit instituted by a creditor against the administrator and heir at law of Mark Hicks, the intestate; and it was charged, in the bill, that the intestate at the time of his death, was a trader within the true intent and meaning of the bankrupt laws. It appeared by the master's report, that the personal estate possessed by the administrator amounted to 170*l.* 11*s.* 10*d.*, and that the administrator had paid several sums of money in respect thereof to the amount of 64*l.* 3*s.* 11*d.*, leaving a clear balance of 106*l.* 7*s.* 11*d.*, which, being insufficient for the payment of 232*l.* 8*s.*, the amount of the intestate's debts, the master had ordered the real estate to be sold, and the produce of such sale, with the rents and profits, amounted to 332*l.* 6*s.* 9*d.*, which had been first applied in the payment of 301*l.* 4*s.* 1*d.*, the principal and interest due on a mortgage thereof, leaving a balance of the real estate to the amount of 31*l.* 2*s.* 7 1-2*d.* The administrator being himself a creditor, had, in the accounts which he had carried in before the master, claimed to retain the amount of his own debt.

Mr. *Milford*, for the plaintiff, contended that as the estate of the intestate was insolvent, the administrator was not entitled to have his costs out of the fund; and in support of that doctrine, cited *Wilkins v. Hunt*.^(a) He further con- [*476] tended, that the administrator not having distinctly retained his debt, before the suit was instituted, he was not now entitled to do so.

(a) 2 Atkyns, 151.

1830.—*Mills v. Roberts.*

The MASTER OF THE ROLLS decided, that the administrator was entitled to his costs, and that the administrator having claimed his debt before the master, that was sufficient to entitle him to retain it.

Mr. *K. Parker* for the heir at law, applied for his costs.

It was ordered that the plaintiff should pay his costs, and receive it over out of the fund without prejudice to the costs of the administrator.

MILLS v. ROBERTS.

Contingent Bequest to Infants.—Maintenance.—Guardians.

ROLLS.—1830: 26th May.

Bequest of 10,000*l.* provided the legatee attain twenty-one.

In a subsequent part of the will, the testator appointed guardians, whom he requested to attend particularly to the education and well being of the legatee, and see that she was properly and virtuously brought up and educated.

Held, that the interest of the legacy was applicable to the maintenance of the legatee, but the principal was contingent.

The legatee being a natural child, the testator had no power to appoint guardians for her, but the persons named in the will being well known to the court as proper persons, they were appointed guardians without a reference to the master.

GEORGE JAMES ROBERTS, by will bearing date the 24th of November, 1823, after giving to plaintiff and Abram Wildey Roberts, a sum of 8,000*l.* in trust to pay the interest to Mary Anne Harben during her life; and after mentioning that he had by a certain deed placed in the names of trustees the sum of 10,000*l.* 3 per cents. for the use of said M. A. Harben [*477] during her life, *gave and bequeathed the said sum of 10,000*l.* after the decease of M. A. Harben, to be equally divided between her two children, Georgiana Charlotte Harben Roberts and her infant brother, James George Harben Roberts, for their joint use and benefit forever. In the event of their both

dying before they attained twenty-one, then over. He also bequeathed to the same two children, after the decease of their mother, in equal proportions, the sum of 8,000*l.* before mentioned, subject to the same bequest over in the event of their dying under twenty-one years. After another bequest, the testator proceeded as follows:—

“I will and bequeath to my daughter, Georgiana Charlotte Harben Robarts, daughter also of the above named M. A. Harben, the sum of 10,000*l.* sterling for her own absolute use and benefit, *provided* she attains the age of twenty-one years; but in default of this, I will and bequeath the said 10,000*l.* sterling to her brother, James George Harben Robarts, provided also he attains the age of twenty-one years; but in default of this, I will and bequeath the said 10,000*l.* to my nephew, Henry Robarts, and his heirs forever.” This was followed by a bequest of another sum of 10,000*l.* in similar terms to James George Harben Robarts, remainder over to his sister in the event of his dying under twenty-one, remainder to Henry Robarts in the event of both dying under that age.

In a subsequent part of his will the testator proceeded thus:—

“I constitute and appoint my brother, Abram Wildey Robarts, and my much esteemed friend, Charles Mills, jun., of Birchin Lane, trustees and guardians to the several persons before named in this my last will and *testament; and I [*478] earnestly request and implore, that they would have the goodness to act, and to attend particularly to the education and well being of Georgiana Charlotte Harben Robart, and see that she is properly and virtuously brought up and educated. And I further will and direct, that the said Georgiana Charlotte Harben Robarts is on no account to dispose of herself in marriage without the consent of her guardians, either before or after she attains twenty-one, on pain of forfeiting two-thirds of the value of the legacies bequeathed to her.”

The testator appointed his brothers and sisters residuary legatees; and Mills and Abram W. Robarts, executors.

The bill was filed by one of the executors to ascertain the interest of the parties in the two legacies of 10,000*l.*, and praying also that guardians might be appointed for the infants, and the funds secured; and the principal question was, Whether the children were to be allowed maintenance out of the interest of these legacies, no other provision being made for their maintenance? The children were illegitimate.

Mr. *Pemberton* and Mr. *Roots*, for the infants, insisted that the clause directing the trustees to attend to the education and well being of the daughter, and appointing them guardians, clearly showed that that legacy must be considered as vested, subject to be divested in a certain event; and cited *Branstrom v. Wilkin-*
son,^(a) *Acherley v. Wheeler and Vernon*.^(b)

Mr. *Tinney* and Mr. *Rolfe*, for the residuary legatees, [*479] argued that the testator having bequeathed the *first two legacies of 10,000*l.* and 8,000*l.* in such manner as to make them vest, (subject to the mother's life interest,) and by making the two latter legacies of 10,000*l.* contingent, had drawn a distinction which sufficiently indicated his intention not to give the children the interest of those two legacies in the meantime. And they concluded that the appointment of guardians might have reference to the event of the mother's dying during the minority of the children, in which case they would be provided for out of the interest of the two first legacies of 10,000*l.* and 8,000*l.* which were vested.

Mr. *Heathfield* for Henry Roberts.

THE MASTER OF THE ROLLS:—Upon this will, it is perfectly plain these children were not intended to take the two sums of 10,000*l.*, unless they attained the age of twenty-one; but the question is, Whether, in other parts of the will, the testator has not used expressions which manifest that he intended they should take the interest of those sums in the meantime?

(a) 7 Ves. 421.

(b) 1 P. Wms. 783.

Now he appoints trustees and guardians, and they are to have the charge of the education of these three children. Could the testator intend that these trustees should educate the children from their own property? and must it not be intended that he meant they should be trustees of the infants' property, to hold it for their benefit, provided they should attain twenty-one, and to apply the produce of it in the meantime to their education? The case of *Branstrom* and *Wilkinson* is an express authority to this effect, and the words "when they shall attain the age of twenty-one years," provide for the same contingency as the words here used.

*Declare that they are entitled to the interest from the [*480] testator's death.

The fund to be secured.

Mr. *Pemberton*.:—There must be a reference to the master to appoint guardians, because the testator was not by law empowered to appoint guardians for the infants.

The MASTER OF THE ROLLS said he should appoint these gentlemen at once to be guardians of the children, knowing them to be proper persons for such a trust.

His Honor added, that he did not declare the legacies to be vested, for they were contingent on the event mentioned in the will, but that the interest should be applied to the maintenance and education of the infants.

Decreed that the infants were entitled to interest on the legacies from the death of the testator, and in case either of them should die under twenty-one, any of the parties were to be at liberty to apply. That the plaintiff and A. W. Roberts, on entering into a recognizance to account, be appointed guardians of the infants during their minorities, and until the further order of the court; and that the master inquire what will be fit to be allowed for the maintenance and education of the infants for the time passed since the death of the testator, and the time to come.

Reg. Lib. 1829, B. p. 1958.

1830.—Meller v. Minet.

[*481] *MARIA MELLER AND ELLEN RICHARDSON, EXECUTRIXES OF JOHN SAMUEL MELLER, DECEASED, *Plaintiffs*; AND JOHN LEWIS MINET, ISAAC MINET, JOHN STRIDE, HENRY COOPER, MARGARET MELLER, WILLIAM BECKETT AND HENRY CIPRIANI, *Defendants*.

Fraud.—Appointment.—Next of Kin.—Costs.

1830: 7th May.

J. S. M., being entitled to the dividends of 4,300*l.* for life, with a power to appoint by any deed or writing the principal after his death, and, in default of appointment, to his next of kin; and being in prison for debt and in great distress, is prevailed upon by H. C. to enter into an agreement for sale of the principal after his death, in consideration of 1,000*l.*, and other sums therein stated to have been previously lent and advanced to him by H. C.

By a subsequent deed, in consideration of 1,854*l.*, therein stated to be due from J. S. M. to H. C., and of 1,000*l.* paid by J. L. M. and others, J. S. M., by the direction of H. C., appointed that the principal should on his death be transferred to J. L. M. and others, with a proviso that they should assign the same to H. C. on payment of 1,000*l.* and interest, and all further advances.

The 1,854*l.*, or any part of it, had not in fact been advanced by H. C.

Held, that this was a clear fraud.

Held, that the appointment was well executed.

That the next of kin of J. S. M. had no claim.

That H. C. was a trustee for the personal representatives of J. S. M. for the excess beyond the money received by J. S. M.

That H. C. should pay costs.

JAMES MELLER, by his will, bearing date the 3d December, 1816, gave his residuary estate unto his executors, the defendants Beckett and Cipriani, upon trust to pay the dividends to his wife for life, and after her death, to pay the dividends to the testator's son, J. S. Meller, during his natural life; and after the decease of testator's wife and son, upon trust to pay, assign, transfer and make over the testator's residuary estate unto such person or persons, and to and for such use and uses as the said J. S. Meller, at any time or times, and from time to time during his life, by any deed or deeds, writing or writings, with or without power of revocation, to be by him sealed and delivered in the presence of, and to be attested by two or more credible

[*482] *witnesses, or by his will as therein mentioned should

direct or appoint the same, and in default of appointment to the testator's next of kin.

The residue consisted, amongst other property, of the sum of 4,300*l.* navy 5 per cent. annuities, since converted into 4,515*l.* new 4 per cent. annuities. In March, 1822, J. S. Meller was in great distress, and confined for debt in the Fleet prison.

The following agreement was there executed between J. S. Meller and the defendant Henry Cooper:—"An agreement made the 16th day of February, 1822, between John Samuel Meller, of Welbeck street, in the county of Middlesex, Esq., of the one part, and Henry Cooper, of Copthall court, in the city of London, merchant, of the other part, as follows:—Whereas the said John Samuel Meller, under the last will and testament of his father, James Meller, late of Howland street, Fitzroy square, in the county of Middlesex, Esq., deceased, is entitled to the right of disposing either by will or deed, amongst other sums, the sum of 4,300*l.* navy 5 per cent. annuities, now standing in the names of William Beckett, Henry Cipriani and Mary Meller, in the books of the governor and company of the Bank of England, as trustees under the said will; and the same annuities will be transferable on the decease of the said John Samuel Meller, but not sooner, being a part of the residue of the personal estate of the said James Meller, deceased. And whereas the said John Samuel Meller now stands indebted to the said Henry Cooper in several sums of money, by the said Henry Cooper lent and advanced to him from time to time, and having occasion for a further sum of money, hath contracted and agreed to sell and convey the said 4,300*l.* navy 5 per cent. annuities to the said Henry Cooper for the further sum of *1,000*l.* It [*488] is therefore witnessed, that in consideration of the several sums of money already lent and advanced to the said John Samuel Meller by the said Henry Cooper as aforesaid; and also, in consideration of the further sum of 1,000*l.*, to be paid by the said Henry Cooper, his executors or administrators, to the said John Samuel Meller at the time or times, and in manner hereafter mentioned, he, the said John Samuel Meller, doth hereby

promise and agree to and with the said Henry Cooper, his executors, administrators and assigns, that he, the said John Samuel Meller, shall and will, at any time or times hereafter, at the request, costs and charges of the said Henry Cooper, his executors, administrators or assigns, convey, transfer or assign, or direct to be conveyed, transferred or assigned, the said sum of 4,300*l.* navy annuities, transferable on his decease as aforesaid to any person or persons, and by any deed or deeds, and in such parts or portions thereof as the said Henry Cooper, his executors, administrators or assigns shall by deed name, appoint or direct. And the said Henry Cooper for himself, his executors and administrators, doth hereby promise and agree to and with the said John Samuel Meller, that in consideration of conveyance or assignment, conveyances or assignments, direction or directions to be made by the said John Samuel Meller as aforesaid, that he, the said Henry Cooper, shall and will pay, or cause to be paid unto the said John Samuel Meller the further sum of 1,000*l.* at the time of his executing the said conveyance or assignment, which is to be completed on or before the 15th day of March next; and also executing at any time after such other conveyances or assignment, direction or directions, wholly or in part, and in proportion, and as the 4,300*l.* navy annuities shall be thereby respectively conveyed, assigned or directed to be conveyed or assigned."

[*484] *By indenture bearing date the 20th day of September, 1822, made between John Samuel Meller of the first part, Henry Cooper of the second part, and the defendants John Lewis Minet, Isaac Minet and John Stride, bankers, of the third part, reciting the will and agreement, and that upon the settlement of accounts between Cooper and J. S. Meller, the latter was, on the 16th of February, 1822, indebted to H. Cooper in the sum of 1,854*l.* 10*s.*, making, with the sum of 1,000*l.* the sum of 2,854*l.* 10*s.* It is witnessed, that in consideration of the said sum of 1,854*l.* 10*s.*, and of 1,000*l.* paid to J. S. Meller at the request of H. Cooper by J. L. Minet, I. Minet and J. Stride, he the said J. S. Meller, by the direction of Cooper, and by deed sealed and delivered in the presence of two witnesses, directed

and appointed that the sum of 4,515*l.* new 4 per cent. annuities should, after the decease of him and Mary Meller, be transferred to J. L. Minet, I. Minet and J. Stride, as their property; and he thereby directed and required the trustees to assign the same to them accordingly, with a proviso that they should re-assign the same to Cooper on payment of 1,000*l.* and interest, and all further advances to him by them.

J. S. Meller died on the 22d December, 1822, having previously made his will, and thereby appointed the plaintiffs executors thereof.

Mary Meller died on the 27th October, 1823. The bill stated the preceding facts, and that J. S. Meller continued in the Fleet prison until the 13th of June, 1822, and that up to that time Cooper had advanced to him 40*l.* only. The bill also stated, that the admission in the indenture, that J. S. Meller was indebted to H. Cooper in the sum of 1,854*l.* 10*s.* was contrary to the *fact; and the bill prayed that the agreement of the 16th February, 1822, and indenture of 20th September, 1822, might be delivered up to plaintiffs to be cancelled, the plaintiffs thereby offering to pay to the defendants J. L. Minet, I. Minet and J. Stride and H. Cooper, the principal and interest which should be found *bona fide* due to them for moneys advanced to J. S. Meller in his lifetime, on an account to be taken for such purpose; or that the indenture of the 20th September, 1822, might stand as a security for the sum of 1,000*l.* only and interest; and in that case, that defendants J. L. Minet, I. Minet and J. Stride might be ordered to re-assign the residue of the said sum of 4,515*l.* new 4 per cent. bank annuities, as the court might direct, and that in the meantime the defendants W. Becket and H. Cipriani might be restrained by the order and injunction of the court from transferring or parting with the said stocks, or any of them, and that the same might be secured by the order of the court.

When this cause came on first to be heard, on the 28th January, 1828, the bill was dismissed as against the mortgagees, whose

1830.—*Meller v. Minet.*

demands on Cooper exceeded the amount of the security, and a reference was made to the master, to inquire what sums were due from J. S. Meller to the defendant Cooper, on the 16th February, 1822, the date of the agreement; also, what sums, if any, were paid by Cooper to J. S. Meller, between the 16th day of February, 1822, and the execution of the indenture of the 20th day of September, 1822.

The master reported, that he did not find that any sum of money was actually due from J. S. Meller to the defendant H. Cooper, on the 16th February, 1822. And he did not find that any subsequent advances were made by the defendant [*486] H. Cooper to J. S. Meller, between *the 16th February, 1822, and the 20th September, 1822, the date of the indenture in the pleadings mentioned inclusive.

Depositions were read in evidence, showing the great distress of J. S. Meller, and that no such sum as 1,854*l.* 10*s.* could have been due to Cooper at the time of executing the agreement.

Mr. *Bickersteth* and Mr. *Skirrow* for the plaintiffs.

Mr. *Agar* and Mr. *Hayter* for the defendant Henry Cooper.

THE MASTER OF THE ROLLS:—J. S. Meller was entitled to the residue of his father's estate, consisting of the sum of 4,800*l.* navy 5 per cent. annuities.

At the time of the transaction in question he was a prisoner in the Fleet. The defendant Cooper there treats with him for the purchase of this stock, and the transfer of it at the time of his death. An agreement is executed, stating that Meller was indebted to Cooper, and in consideration thereof, and of the further sum of 1,000*l.* to be paid by Cooper, Meller covenanted that he would assign the 4,800*l.* annuities to Cooper.

I referred it to the master to inquire whether there was anything due in respect of the debts so stated in the agreement to be

due to Cooper. The master has reported that there was not any sum due.

A clear fraud has been established against Cooper: he persuaded Meller to sell the reversion for 1,000*l.*, and Cooper, in order that he might be enabled to procure *money [*487] upon it, and represent that he had given a fair value for it, persuaded Meller to allow it to be stated in the agreement, that he, Meller, was indebted to Cooper, and that the purchase was as well in consideration of the sum which he was so indebted as of the further sum of 1,000*l.* Cooper took advantage of this poor man's distress.

With respect to the plaintiffs, the appointment by which they claim, was made under a general power, which was clearly well executed. The next of kin can have no claim. The mortgagees being no party to the fraud, the appointment to them cannot be impugned.

But is Cooper to escape? I am of opinion that the executors have duly filed their bill, and although they have not properly stated their prayer, yet under the prayer for general relief, they are entitled to such relief as the case made by the bill requires. I am of opinion that Cooper must be considered a trustee for Meller for the excess beyond the money received by Meller from Cooper; and there is so much fraud in this case, that Cooper shall pay the costs.

An account to be taken of the stock which has been possessed by Cooper or Minet & Co.

Decree that (after deducting what shall be found due to Cooper, on account of the 1,000*l.* and interest) the value of the stock and dividends be paid by Cooper to the plaintiffs. Costs of suit and inquiries to be paid by defendant H. Cooper to plaintiffs.

Reg. Lib. 1829, B. 1502.

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*PALMER v. SCOTT AND OTHERS.

Attorney and Client.—Mortgage.—Proposal.

ROLLS.—1830: 1st March.

An attorney, having received money for his client, and being owed on mortgage from another person the sum of 3,000*l.*, wrote to his client that he had that mortgage in his hands, and having received the like amount for the client, he undertook when thereunto required, to execute a transfer of the same.

Held, that this was not mere proposal, and although there was no express acceptance, yet there being no refusal of the security, the client was entitled to all such interest as the attorney had therein.

THE plaintiff having sold an estate, employed Mr. Hampson, a banker and solicitor in Bedfordshire; and a letter from the plaintiff to him, in December, 1821, contained these words:—"You will recollect that I propose to lay all the money out upon mortgage." Mr. Hampson received for the plaintiff in respect of the sale of this estate and some timber, the sum of 3,361*l.* 15*s.*, and shortly afterwards he wrote and sent to the plaintiff the following letter:—

"LUTON, 27th Dec., 1822.

"My dear sir,

"I have great pleasure in informing you that the Farley purchase is now finally settled. I have in the other side sent you the particulars, with the balance paid to me, amounting to 3,261*l.* 15*s.* I will endeavor to obtain very soon a security for this sum; but if I should not be successful, I will transfer to you a mortgage of mine for 3,000*l.* In the meantime I will engage to pay you 4 per cent. for the interest of the money until it is invested. I do assure you the settlement of this business has given me much gratification, because I consider that we have made Mr. Crawley submit to the original agreement.

"Your's sincerely

"LEO. HAMPTON."

On the 14th of April, 1823, and 14th of June, 1823, the plaintiff wrote letters to Mr. Hampson, pressing him to furnish his ac-

count; and in one of which he said, that several years had passed since a regular settlement had taken place between them.

*On the 17th of June, 1823, Mr. Hampson wrote to [*489] the plaintiff that he would in a few days make out a statement of the account, and send it with a remittance for the balance, and an acknowledgment that he held in his hands a mortgage deed for 3,000*l.*, with an undertaking to assign it to the plaintiff when required.

On the 15th of July, 1823, Mr. Hampson sent to the plaintiff a draft for 361*l.* 15*s.* being the balance of the Farley sale, and on account of some timber sold, accompanied by the following document:—

“15th July, 1823.

“I acknowledge to have in my hands a mortgage deed made by Thomas Nicoll to me of an estate at Studham in the county of Bedford, for securing the sum of 3,000*l.* and interest. And having received this sum of John Sharpe Palmer, Esq., (the plaintiff) in December last, I do hereby undertake, when thereto required by him, to execute a transfer to him of this mortgage.

“LEONARD HAMPSON.”

On the 16th of July, 1823, the plaintiff wrote to Mr. Hampson, acknowledging the receipt of the 361*l.* 15*s.*; and saying that he should be glad to receive a debtor and creditor account, which Mr. Hampson had promised on his return home.

In a letter of the 9th of August, 1823, the plaintiff alludes to a purchase he had made in Essex, and adds that it was absolutely necessary he should arrange his affairs, for which purpose he intended to go to Mr. Hampson's at Luton, where he resided.

On the 13th of August, 1823, the plaintiff wrote to Mr. Hampson, stating that he had not received an answer to his former letter, and that he should not have 3,000*l.* to *put [*490] out on mortgage, as he should want 1,000*l.* to pay for his late purchase about the middle of September, and that he

depended upon that, as the money was left in Mr. Hampson's hands as a temporary arrangement, agreeable to Mr. Hampson's desire. In October, 1823, Mr. Hampson sent to the plaintiff the sum of 1,000*l*. The mortgage was never assigned to the plaintiff; and in March, 1824, Mr. Hampson died, and administration to his effects was granted to Scott and Jones, two of the defendants, and they possessed themselves of the mortgage deed; but the defendant Williamson, a partner of Mr. Hampson in his business of a solicitor, possessed himself of certain title deeds relating to the estate in mortgage; and the surviving partner of Mr. Hampson, as a banker, having become bankrupt, his assignees, who were also defendants, claimed some lien on the mortgage. The mortgage was in the possession of the administrators.

The bill prayed that the plaintiff might be paid the balance due to him, or that the mortgage might be assigned to him.

Defendant Williamson disclaimed any interest in the deeds.

Mr. *Treslove* and Mr. *Rawlings* for the plaintiff.

Mr. *Bickersteth*, Mr. *Tinney* and Mr. *Barber*, for the defendants.

THE MASTER OF THE ROLLS:—A reference must be made to inquire what interest Hampson had in the mortgage.

The plaintiff employed Hampson as his solicitor in this purchase. The plaintiff informed Hampson of his intention to lay out the money on mortgage.

[*491] *(His Honor then referred to the letters of the 27th of December, 1822, and 15th of July, 1823.)

This is a positive agreement, and requires, therefore, no acceptance in writing. Where there is only a proposal made, it is necessary there should be an acceptance, but where there is a positive engagement, no acceptance is necessary. Unless refused,

 1830.—*Newbold v. Roadknight*.

such engagement constitutes by itself an agreement which this court will enforce. The letter of the 16th of July, 1823, contains no refusal; on the contrary, the plaintiff in another letter stated that he had accepted that security of Hampson as a temporary arrangement.

(His Honor then read the letter of the 13th of August, 1823.)

The mortgage was to be a security until the 3,000*l.* was invested by Hampson. There is nothing in the correspondence to show that the plaintiff refused it.

Declare that the plaintiff is entitled, as a security for what remains due to him for principal and interest, to all such interest as Hampson had in the security alluded to in the letter of the 15th of July, 1823. Refer it to the master to inquire what interest Hampson had in the mortgage at the date of the agreement of the 15th of July, 1823, whether he continued to be entitled to the same interest up to and at the time of his decease, and what other interest he had at the time of his death.

Reserve further directions and costs.

Reg. Lib. A. 1829, p. 2129.(a)

(a) This decree is to be found in the index to the decrees *only*, under the title of *Exton v. Scott*.

*NEWBOLD *v.* ROADKNIGHT.(b) [*492]

Legacy.—Ademption.

1830: 26th July.

Devise of land upon trust, to sell the same, and out of the product to pay 3,000*l.* to A.

The testator sold the estate in his lifetime.

Held, that the legacy was adeemed.

IN this case William Norris, deceased, by his will, which had

(b) *S. C.*, 1 Russ. & M. 677.

depended upon that, as the money was left in Mr. Hampson's hands as a temporary arrangement, agreeable to Mr. Hampson's desire. In October, 1823, Mr. Hampson sent to the plaintiff the sum of 1,000*l*. The mortgage was never assigned to the plaintiff; and in March, 1824, Mr. Hampson died, and administration to his effects was granted to Scott and Jones, two of the defendants, and they possessed themselves of the mortgage deed; but the defendant Williamson, a partner of Mr. Hampson in his business of a solicitor, possessed himself of certain title deeds relating to the estate in mortgage; and the surviving partner of Mr. Hampson, as a banker, having become bankrupt, his assignees, who were also defendants, claimed some lien on the mortgage. The mortgage was in the possession of the administrators.

The bill prayed that the plaintiff might be paid the balance due to him, or that the mortgage might be assigned to him.

Defendant Williamson disclaimed any interest in the deeds.

Mr. *Treslove* and Mr. *Rawlings* for the plaintiff.

Mr. *Bickersteth*, Mr. *Tinney* and Mr. *Barber*, for the defendants.

THE MASTER OF THE ROLLS:—A reference must be made to inquire what interest Hampson had in the mortgage.

The plaintiff employed Hampson as his solicitor in this purchase. The plaintiff informed Hampson of his intention to lay out the money on mortgage.

[*491] *(His Honor then referred to the letters of the 27th of December, 1822, and 15th of July, 1823.)

This is a positive agreement, and requires, therefore, no acceptance in writing. Where there is only a proposal made, it is necessary there should be an acceptance, but where there is a positive engagement, no acceptance is necessary. Unless refused,

such engagement constitutes by itself an agreement which this court will enforce. The letter of the 16th of July, 1823, contains no refusal; on the contrary, the plaintiff in another letter stated that he had accepted that security of Hampson as a temporary arrangement.

(His Honor then read the letter of the 13th of August, 1823.)

The mortgage was to be a security until the 3,000*l.* was invested by Hampson. There is nothing in the correspondence to show that the plaintiff refused it.

Declare that the plaintiff is entitled, as a security for what remains due to him for principal and interest, to all such interest as Hampson had in the security alluded to in the letter of the 15th of July, 1823. Refer it to the master to inquire what interest Hampson had in the mortgage at the date of the agreement of the 15th of July, 1823, whether he continued to be entitled to the same interest up to and at the time of his decease, and what other interest he had at the time of his death.

Reserve further directions and costs.

Reg. Lib. A. 1829, p. 2129.(a)

(a) This decree is to be found in the index to the decrees *only*, under the title of *Exton v. Scott*.

*NEWBOLD v. ROADKNIGHT.(b) [*192]

Legacy.—Ademption.

1830: 26th July.

Devise of land upon trust, to sell the same, and out of the product to pay 3,000*l.* to A.

The testator sold the estate in his lifetime.

Held, that the legacy was ademed.

IN this case William Norris, deceased, by his will, which had

(b) *S. C.*, 1 Russ. & M. 677.

Mr. *Pemberton* and Mr. *Wakefield* for the plaintiffs, argued that the testator intended Thomas Newbold to have the legacy of 3,000*l.* at all events, and that the same was a general pecuniary legacy charged upon real estate, and that such intention was apparent from his use of the words "which I hereby give and bequeath to him accordingly" contained in the will; and that the subsequent sale of the estate at Eathorpe was only an act which the testator had directed his trustees to do; and that his performing the same in his lifetime ought not to be considered to invalidate his own gift of the 3,000*l.*; and that a legacy charged upon real estate did not fail merely from the circumstance of the testator *not being entitled to such estate at the time of* his death, and cited the case of *Fowler v. Willoughby*(a) [*495] as an authority to that effect; and argued that, even if the court should be of opinion that the legacy was adeemed by the sale of the Eathorpe estate, that the gift of the 3,000*l.* was re-established by the confirmatory words of the codicil.

Mr. *Tinney* and Mr. *Jeremy* for the defendants, insisted, from the words of the will, that the legacy of 3,000*l.* was not a general pecuniary legacy, but was given out of the produce of the Eathorpe estate only; and that, as according to the case of *Page v. Leapingwell*,(b) a legacy charged upon real estate is a specific bequest, the gift of the 3,000*l.* must have failed upon the sale of the Eathorpe estate; and, further, that, as such sale was a revocation of the devise of the realty, the legacy must have been thereby adeemed, and cited as an analogous case, *Arnald v. Arnald*.(c) They submitted, that the case of *Fowler v. Willoughby*, was distinguishable from the present by the circumstance that the gift there was merely pecuniary with a particular security, and that the security failed by accident, whilst, in this instance, the gift of the legacy was not independent of the realty; and that the revocation was the result of an act indicative of intention on the part of the testator himself; and, to show that the words "which

(a) 2 Sim. & Stu. 354.

(b) 18 Ves. 463 *a*.

(c) 1 Bro. C C. 401.

I hereby give and bequeath to him accordingly," did not render the legacy so independent, referred to the practice of conveyancers in using such words, and to the case of *Hancox v. Abbey*.^(a) And as to the confirmation of the gift by the codicil, they contended, that since the effect of republishing a will was to make it operate at the time of the republication, the codicil, in this instance, could not re-establish the gift, because it was not merely pecuniary, and the estate upon which it had been charged had then *been sold; and that where a codicil sets up a particular [*496] gift, confirming the will in all other respects, it does not revive a devise revoked, as appeared from several cases, of which they cited only *Irod v. Hurst*^(b) and *Crosbie v. M'Doual*.^(d)

The counsel for the infant children of the plaintiffs, upon the last point cited also the case of *Monck v. Lord Monck*.^(d)

Mr. *Harwood* appeared for the trustees and executors.

Mr. *Pemberton*, in reply, maintained that the gift was to be considered as a pecuniary legacy not adeemed by the act of the testator, and that the same ought to be paid out of his personal estate; that the cases cited for the defendants were not in point, and that *Fowler v. Willoughby* was the ruling authority on the subject; but lest the court should think that the legacy for any reason failed, insisted that the bequest thereof was restored by the codicil.

The MASTER OF THE ROLLS having postponed his judgment to this day, (2d of August,) after stating the case, declared it to be his opinion, that the legacy was not a general bequest, but a legacy out of the estate at Eathorpe; and that, upon the cases, it was adeemed by the sale of that estate; that the case of *Fowler v. Willoughby*, in which the question was, whether on a charge of a legacy on real estate as a further security, if such security

(a) 11 Ves. 179.

(b) 2 Freem. 224.

(c) 4 Ves. 610.

(d) 1 Ball. & B. 306.

1830.—Humphreys v. Howes.

should fail, the fact of its having been so charged would render the gift altogether ineffective, was very distinct in its nature from the present; and, after adverting to the fact of the [*497] testator having in the *codicil mentioned the completion of his purchase of the estate at Marton, and not having alluded to that at Eathorpe, declared that, upon the intention to be derived from the acts of the testator, and upon the authorities, he was of opinion that the plaintiff, Thomas Newbold, was not entitled to be paid the legacy of 3,000*l.* out of any part of the assets of the said William Norris.

Decree that the plaintiff, Thomas Newbold, is not entitled to the legacy of 3,000*l.* in the pleadings mentioned.

Reg. Lib. 1829, B. p. 2363.

HUMPHREYS v. HOWES AND OTHERS.

Will.—Survivorship.

ROLLS.—1830: 12th July

Request of residue upon trust, to pay the dividends to three persons during their lives and the life of the survivor of them; and after their deaths to transfer the principal to A. and B., and if either of them died before his share of the trust money became payable, without leaving issue of his body lawfully begotten, then his share should go to the survivor when his original share would become payable. A. died in the lifetime of the testator. B. survived the testator and the persons to whom life interests were given.

Held, that B. was entitled to one moiety as his original share, and to the other moiety as having survived A., who died without leaving issue of his body.

JOHN HUMPHREYS, by his will, bequeathed the residue of his personal estate unto trustees, upon trust to invest the same, and pay the dividends and interest to two of his brothers and his sister during their lives, and the life of the survivor of them, during his or her natural life, and after their deaths to transfer the principal to his two nephews, John Humphreys and John Crow, and if either of them should die before his share of the trust moneys became payable, without leaving issue of his body lawfully be-

gotten, then his share should go to the survivor when his original share would become payable; and if both those nephews should die without leaving issue before their shares became *payable, then upon trust for the children of his [*498] four brothers and of his sister, when they should respectively attain twenty-one. The residue amounted to about 12,000*l.* in different stocks.

The two brothers first mentioned died in the lifetime of the testator, and John Crow also died in the lifetime of the testator, without leaving issue. The testator's sister, and the other nephew, the plaintiff, John Humphreys, survived the testator. The testator's sister died in July, 1829.

Mr. *Tinney*, Mr. *Spence* and Mr. *Lloyd* for the plaintiffs, contended that the bequest over to the surviving nephew took effect; and cited *Humberstone v. Stanton*,(a) *Walker v. Main*,(b) and *Willing v. Baine*.(c)

Mr. *Pemberton* and Mr. *Bethel* for the next of kin, argued that this case was to be distinguished by the circumstance of life interests being first given to other persons, and that the testator, in the limitation over to the survivor of the two nephews, in the event of either of them dying before his share became payable, only contemplated the death of one of them after his own death, and during the life of the other tenant for life. They cited *Corbyn v. French*,(d) *Bone v. Cooke*,(e) *Cripps v. Woolcot*,(g) *Miller v. Warren*.(h) and *Rider v. Wager*.(i)

Mr. *Pattison* for the trustees.

THE MASTER OF THE ROLLS :—The question is, whether, in the event that has happened, the *interest intended for the deceased nephew survived to the other? [*499]

(a) 1 V. & B. 385.

(b) 1 Jac. & Walk. 1.

(c) 3 P. W. 113.

(d) 4 Ves. 418.

(e) M'Clellan, 168.

(g) 4 Mad. 11.

(h) 2 Vern. 207.

(i) 2 P. W. 328.

1830.—Hoggart v. Scott.

Upon reference to the cases, I find that the leading case upon the subject is *Willing v. Rain*; (a) there the testator gave 200*l.* apiece to his children, payable at their respective ages of twenty-one, and if any of them died before the age of twenty-one, then he directed that the legacy given to the person so dying should go to the surviving children. One of them died in the lifetime of the testator, and before twenty-one; and it was held that the surviving children took the whole. That authority was referred to by Sir W. Grant, in *Humberstone and Stanton*, and he there states, that in the case of *Willing v. Baine*, "it was held, and is now settled, that the bequest over takes place." In the argument of the present case of *Humphreys and Howes*, it is stated, there is this distinction, that in *Willing v. Baine* and *Humberstone v. Stanton*, there was no previous interest for life; and some cases have been referred to as authority for that distinction, but it does not appear to me that the principle upon which those cases were decided has any application to the present case. The very point in question here has been, in truth, decided in the case of *Walter v. Maine*, which has been referred to in the argument.

Decree, that upon the death of the testator's sister, the plaintiff John Humphreys became entitled to one moiety of the residue as his original share, and to the other moiety as having survived John Crow, who died, without leaving issue of his body lawfully begotten in the lifetime of the testator.

Reg. Lib. A. 1829, fol. 2098.

(a) 3 P. W. 113.

[*500] *BETWEEN CHARLES LANCELOT HOGGART, THOMAS ABBOT AND T. C. SMITH, *Plaintiffs*; AND JOHN SCOTT, *Defendant*.

Vendor and Purchaser.

ROLLS.—1830: 9th March.

Houses and lands were devised to trustees in fee, upon trust for sale. The surviving trustee appointed the plaintiffs his executors, but did not make any devise which

1830.—Hoggart v. Scott.

comprehended trust estates. On the death of the surviving trustee, his executors sold the property in lots. The defendant became the purchaser of four of them, and just as his purchase was about to be completed, it was discovered that the legal estate was in an infant, the heir at law of the surviving trustee. The plaintiffs thereupon presented a petition to the court, under the statute 6 G. IV, that the infant might be directed to convey. The plaintiffs apprised the defendant of this proceeding, to which he made no objection. Twelve months elapsed before the master's report could be obtained, and a short time previously the defendant commenced his action for the deposit, and subsequently recovered it; in the meantime the dilapidations of the houses purchased had increased.

Held, that although the defendant might have retired from the contract on the discovery of the defect in the vendor's title, yet as he did not do so, and acquiesced in the proceedings which were necessary to clothe the plaintiffs with the legal title, and there being no evidence that reasonable diligence was not used in the master's office, the plaintiffs were entitled to a decree for specific performance.

Held, that the defendant was entitled to the amount of the dilapidations.

Held, that the defendant was entitled to costs.

Held, that the plaintiffs were [not?] only entitled to interest from the date of the decree, but that they were entitled to the rents up to that date.

THE plaintiffs Abbot and Smith, by the other plaintiff, Hoggart, an auctioneer, sold four lots of houses to the defendant. An abstract of title was delivered to the solicitors for the purchaser, and they prepared the draft of a conveyance, and sent it to the solicitor of the vendors for his perusal, and he having approved and returned it, the purchaser's solicitors had it engrossed. It was soon afterwards discovered by the purchaser of another lot that the legal estate was not in the vendors, but in the infant heir at law of one Robert Abbot, the survivor of two trustees, to whom this property had been devised by the will of Thomas Bush upon trust for sale. Robert Abbott had made a will, by which he appointed the vendors his executors, but it did not contain any devise that would pass this trust estate, which therefore descended to his infant grandson. [*501]

This discovery was made in March, 1826, and a petition was presented to the Court of Chancery, praying that the infant might be directed to convey under the statute 6 G. IV. On the 23d June, 1826, the court made the usual reference to the master, but from difficulties experienced in procuring certificates of registry of births, &c., and other circumstances, the report was not completed until the 26th May, 1827. The defendant was ap-

1830.—Hoggart v. Scott.

prized that these proceedings were going on. In September, 1826, the defendant's solicitors, by letter called upon the vendor's solicitor to complete the title or return the deposit, and they also sent letters to the same effect in January, 1827, and two or three times afterwards. The vendor's solicitor in February and March wrote letters to the solicitors for the purchaser, reporting the progress of the proceedings; and in May, 1827, the vendor's solicitor wrote the defendant's solicitors, that he every day expected to receive the master's report, when he would immediately proceed to complete the title, that he had experienced much difficulty in making the same perfect, and that no time had been lost.

A few days afterwards the defendant commenced his action against the plaintiff Hoggart for his deposit.

The master's report was confirmed in June, and thereupon the vendor's solicitor sent the solicitors for the defendant an abstract of the report, to which they sent no answer, but they proceeded with the action, and at the trial on the 14th July, 1827, the jury found a verdict for the plaintiff.

[*502] *There was evidence on the part of defendant of dilapidations; a surveyor deposed that in January, 1826, there were general dilapidations to the extent of 155*l.*, but that the property was then in tenantable repair; that he again surveyed the property in June, 1828, when the premises had become greatly dilapidated, and the principal part thereof so run to waste, as to render it impossible to repair the same. The tenants had, for the most part quitted the houses.

Mr. *Bickersteth* and Mr. *Lynch* for the plaintiffs, cited *Hudson v. Bartram*,^(a) *Wynn v. Morgan*,^(b) *Seton v. Slade*,^(c) and argued that the defendant having consented to the petition to the court, and concurred in the other proceedings, he had waived any right he might have had to get rid of the contract.

(a) 3 Mad. 440.

(b) 1 Ves. 202.

(c) 1 Ves. 264.

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Mr. *Pemberton* and Mr. *Phillimore* for defendants:—It now turns out that the plaintiffs were not trustees for sale; they had neither a legal right nor a beneficial interest; they had no authority for the purpose of selling; they had no right to sell; the trustees died, and the survivor devised his estates to the present plaintiffs; it turns out that the trust estates did not pass by that devise. How is it possible that they can enforce a sale? they have entered into a contract which they not only cannot perform, but which they had no right to enter into. Here, the legal estate that has been obtained is not an addition to their interest, but long after the institution of this suit the plaintiffs clothe themselves with a character which they had not at the time of the sale; there are many cases on the point. These plaintiffs not being trustees at the *time they entered into the contract, have no right to bind the defendant. [*503]

The contract has been rescinded at law, and, since the purchase, the property has sustained considerable dilapidations; they cited *Boehm v. Wood*,^(a) *Hudson v. Bartram*,^(b) and *Lloyd v. Collett*.^(c)

THE MASTER OF THE ROLLS :—The objections urged are:—

- 1st. That the vendors have no power to sell.
- 2d. That there has been unreasonable delay.
- 3d. That the premises are dilapidated.

The testator devised to trustees with, power of sale, and the present plaintiffs, Abbot and Smith, are the personal representatives of the surviving trustee: by a misapprehension the plaintiffs thought themselves clothed with the power of sale. An abstract was delivered in pursuance of the contract; some time

(a) Jac. and Walk. 419.

(b) 3 Mad. 440.

(c) 4 Brown, 469.

afterwards it was discovered, not by this defendant, but by the purchaser of another lot, that the plaintiffs had not the power of sale, and that the legal estate had descended to an infant trustee. The vendors presented a petition under the 6 G. IV, a communication was made to the purchaser that such a petition was presented, he made no objection to that proceeding, and he, therefore, must be held to have acquiesced in it, provided it was prosecuted with reasonable diligence. Considerable time was occupied in making out the pedigree, and the master made his report twelve months afterwards.

[*504] *The plaintiffs were not mere strangers,—they have assumed the execution of the trusts, but without efficient legal authority.

Those vendors having acquired the legal authority before the hearing of this suit, there is no objection to a decree for specific performance,—the defendant might have retired from the contract on the discovery of the defect in the vendor's title; but he did not do so, he acquiesced in those proceedings which were necessary to clothe the plaintiffs with the legal title, and there is no evidence that reasonable diligence was not used in the master's office.

I am of opinion, therefore, that on the ground of delay there is no objection.

With respect to the dilapidations, the defendant has a right to an inquiry what the dilapidations are. I am of opinion that the plaintiffs are entitled to a decree for a specific performance, and that the defendant is entitled to an inquiry respecting dilapidations, reserving further directions therein.

The defendant is entitled to the costs of the suit, a good title not having been made at the time of the commencement of the suit.

Decreed, that the plaintiffs are entitled to a specific perform-

 1831.—Peake v. Gibbon.

ance of the agreement. The master to inquire what dilapidations the premises have sustained since the contract for sale. The master to tax the defendant's costs, which, when taxed, are to be paid by the plaintiffs to the defendant.

Reg. Lib. 1829, A. p. 1541.

*The defendant waived all objections to the title. [*505] The master estimated the dilapidations at 175*l.* 10*s.* His report was confirmed. This cause came on for further directions on the 3d December, 1830, when the question of interest was discussed; and his Honor held, that the defect in title could not properly be called an unforeseen occurrence, and that the defendant had a right to assume that the vendors could make a good title, that it was the fault of the vendors that the premises stood empty; and it was decreed that the defendant should pay unto the plaintiffs, Abbott and Smith, interest on the sum of 1,280*l.*, the purchase money, from the 9th March, 1830, (the time of the decree,) and that the rents up to the 9th March, 1830, should be paid to the plaintiffs. The master to tax defendant's costs of inquiry as to dilapidations, and his subsequent costs, and the plaintiffs to pay the same to the defendant.

Reg. Lib. 1830, A. p. 466.

PEAKE v. GIBBON.

Insolvent Trustee.—Costs.

ROLLS.—1831: 18th February.

The provisional assignee is entitled to his costs from the mortgagee, in a suit for foreclosure by the mortgagee, who will be allowed to add them to the principal and interest due to him on the mortgage.

THIS was a suit by a person beneficially interested in a sum of money secured by a mortgage against the person to whom, as a trustee, the mortgage was made, and the heir at law of the

1830.—*Alcock v. Taylor*.

mortgagor, for an assignment of the mortgage by the trustee, and for foreclosure.

[*506] *The heir having taken the benefit of the act for the relief of insolvent debtors, a supplemental bill was filed against the provisional assignee.

An argument was raised, whether the provisional assignee should be allowed his costs; and the Master of the Rolls said, it would be very hard if he were not allowed them, he being a public officer. His Honor made the usual decree for foreclosure, and ordered that the plaintiff should pay the costs of the provisional assignee, and add them to his debt.

Mr. *Pemberton* and Mr. *Wakefield* for the plaintiff.

Mr. *Hind* for the trustee.

Mr. *Tied* for the provisional assignee.

THOMAS ALCOCK v. RICHARD TAYLOR.

Partnership.

1830: February 23d.

The plaintiff and defendant held some powder mills on a lease, which would expire in 1831. The plaintiff filed his bill for a dissolution of the partnership; it was objected by the defendant that the partnership must last during the lease, but the court held the partnership dissolved from the time stated in a notice given by the plaintiff to the defendant.

THE bill set forth a lease from the Duke of Northumberland to Heneage Legg and the defendant, of certain powder mills and lands on Hounslow 'Heath, from the 29th of September, 1810, for the term of twenty-one years, at the yearly rent of 450*l.* and 100 weight of gunpowder.

This lease was granted for the benefit of the lessces themselves, and Mr. Joseph Alcock and a Mr. *Crawford; each having a certain number of seventy-two shares, into which the trade or business of making and vending gunpowder carried on at the mills had been divided. [*507]

In the year 1820, Joseph Alcock became entitled to thirty-five sixtieth parts of the residue of the term, and defendant, Richard Taylor, became entitled to the remaining twenty-five sixtieth parts; and they carried on the business up to the time of the death of Joseph Alcock, on the 2d of August, 1821.

Joseph Alcock, by his will, gave all his property to his son of the same name, and he and the defendant continued to carry on the business. On the 20th of December, 1822, Joseph Alcock, the younger, also died, having by his will given all his property to his brother, the plaintiff; and the plaintiff and defendant continued to carry on the business.

On the 13th of July, 1827, the plaintiff gave the defendant notice in writing of his desire to settle the accounts of the partnership, and that the partnership should be dissolved.

The bill prayed that the accounts might be taken, the partnership dissolved, the property sold, and the receiver appointed.

The defendant, by his answer, stated that there was an understanding between him and the plaintiff that the business should be carried on during the continuance of the lease, unless an opportunity of selling advantageously to the satisfaction of both parties should occur; and the defendant insisted that that understanding was recognized in the following letter, relative to a proposal made *by the plaintiff to the defendant to [*508] employ a son of the defendant in the business:—

“KINGSWOOD.

“My dear Sir,—I am afraid you misunderstood my object in alluding to your son's going to the gunpowder office; for I can

1830.—*Alcock v. Taylor*.

most truly assure you that I have only one end in view, which was intended for your benefit and your son's, for, if to-morrow you wrote me word that you wished to wind up the concern, I should be most happy, and certainly I never yet have looked forward to any ultimate advantage in the trade, but have only endeavored as much as possible to make the best of a bad thing, since it was impossible to get rid of it. I therefore looked forward to 1831 to wind up; although, at the same time, one cannot tell for certain that one may remain of the same opinion. I am, &c.,

“THOMAS ALCOCK.

“R. TAYLOR, Esq., Hounslow Heath.”

And the defendant insisted that the business should be carried on during the continuance of the lease.

Mr. *Bickersteth* and Mr. *M'Arthur* for the plaintiff:—Lord Eldon's judgment, in *Crawshay v. Maule*,^(a) applies to this case: that learned judge said that, “where no term is expressly limited for the duration of a partnership, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party.”

Mr. *Tinney* and Mr. *Barber*, for the defendant, contended that there was evidence in the case that the partnership should continue until 1831.

[*509] *The MASTER OF THE ROLLS did not consider there was any such agreement, and declared the partnership dissolved from the time stated in the notice.

Accounts to be taken.

Further directions and costs reserved.

(a) 1 Swanst. 508.

1830.—*Besant v. Richards*.

*BESANT v. RICHARDS.**Vendor and Purchaser.***ROLLS.**—1830: 30th March.

The defendant contracted to sell an inn to the plaintiff, and in the treaty represented to him that the agreement under which the tenant in possession held it was a void agreement, and that he would give the plaintiff possession at Michaelmas following. He had in fact given the tenant notice to quit at that time; the tenant did not quit. These representations were proved by witnesses.

Held, that the plaintiff was entitled to be released from the agreement, or that he might at his election perform it and have compensation. He elected to have performance, and it was decreed to him, with compensation and costs.

THIS was a suit by a purchaser against a vendor for specific performance of a contract for the sale of an inn, and for compensation. The contract was entered into on the 30th of March, 1827, for the sale of the inn, and the other hereditaments held by Matthew Watson, for 1,300*l.*; and it was thereby agreed that the title should be made good by the vendor, and the expense of the conveyance borne by the purchaser, and that the sale should be completed at Michaelmas then next.

There was no other stipulation in the agreement. In the previous treaty, the defendant represented to the plaintiff that the agreement under which Watson held the inn was a void agreement, and good for nothing; that he had served Watson with a notice to quit at Michaelmas following, and that he would give the plaintiff possession at that time.

*Watson died before the time arrived, and his widow, [*510] who was his personal representative, refused to quit, insisting upon the validity of the agreement.

The agreement was for a ten years' term. The defendant had, in fact, given Watson the notice to quit; and several witnesses proved admissions by the defendant that he had made the representation stated.

Mr. Pemberton and Mr. Richards for the plaintiff:—The de-

defendant represented to the plaintiff that he could give him possession in September; and, upon the faith of then having possession, which was his great object, the plaintiff entered into the contract. The case of *Dobell v. Stevens*(a) is in point; that was an action by the purchaser of a public house against the vendor, who had made deceitful representations respecting the amount of business done in the public house, and the rent received for the tap: it was held, that the purchaser might maintain an action on the case for the deceitful representations, although they were not noticed in the contract or in the conveyance. Several of the witnesses examined on the part of the plaintiff have sworn to the representations made to him by the defendant, and the mere fact of the defendant having given his tenant notice to quit, shows plainly that he was to put the plaintiff in possession in September. It must be intended from this fact that the defendant contracted to give the plaintiff possession.

Mr. *Bickersteth* and Mr. *Girdlestone*, jun., for the defendant, argued that, as the tenancy of *Watson* appeared upon [*511] the contract, it was the plaintiff's own *fault if he did not inquire into the effect of the agreement with him; and contended that the delivery of possession was not an essential part of the contract.

THE MASTER OF THE ROLLS:—On the 30th March, 1827, the plaintiff enters into an agreement with the defendant for the purchase of the Bull Inn, then in the possession of *Matthew Watson*; but the plaintiff's case is, that he entered into the agreement with the representation that a prior agreement entered into with *Watson* was a void agreement. I cannot conceive evidence more clear to prove the fact of that representation; and the concurring testimony of all the witnesses makes it evident that the defendant had made an admission of his having made it. The defendant does not deny the representation,—that he did represent that it was a void agreement. The defendant adds in his answer, that he said to the plaintiff, "You had better consult your own solici-

(a) 3 B. & C. 423; 5 Dowl. & Ry. 490.

1830.—Wynniat v. Lindo.

tor;" but there is nothing in the shape of evidence to prove this allegation in the answer. The effect of the representation is decided by the case of *Dobell v. Stevens*, which has been cited. I am of opinion that the plaintiff ought not to be bound by the agreement, purchasing, as he did, on the faith of that representation. He is entitled to be released from the agreement altogether; or, if he chooses, he may perform it, and have compensation. The plaintiff has his election.

Mr. *Pemberton* elected to take performance with compensation.

THE MASTER OF THE ROLLS:—I think you are entitled to take which you please.

*Decreed, that the plaintiff was entitled to compensation, [*512] and that the contract be carried into effect, and that the master ascertain what compensation the plaintiff is entitled to in respect of the agreement between defendant and Watson from the 29th of September, 1827, to the expiration of the term of ten years, thereby agreed to be granted, and the amount, when ascertained, with the plaintiff's costs, to be deducted from the purchase money.

Reg. Lib. 1829, A. p. 942.

WYNNIAT v. LINDO.

Vendor and Purchaser.—Parties.

ROLLS.—1830: 22d February.

A party having purchased land, and signified at the time that he made the purchase on behalf of the trustee in his marriage settlement, who had money vested in him to be laid out in land, and a bill being filed against him for specific performance, the court would not allow the cause to proceed until the trustee was made a party; and the cause stood over for that purpose.

THIS was a bill for specific performance by a vendor against the defendant, who, in treating for the purchase, disclosed to the vendor that he made the purchase for another person, who was a trustee in the marriage settlement of the defendant, and who had

 1830.—*Bull v. Johns*.

money vested in him for the purchase of land for the purposes of the trusts of that settlement.

Mr. Preston and Mr. Barber for the plaintiffs.

THE MASTER OF THE ROLLS:—This bill is filed against the defendant personally, to compel him to complete his contract after the disclosure he made that he was merely treating on the part of his trustee. I am of opinion it is unreasonable: [*513] that it is not consistent with the practice of the court *and that there is no precedent for it. This cause must stand over to make Mr. Lucas, the trustee, a party.

BULL *v.* JOHNS.

Will.

WESTMINSTER HALL.—1830: 23d June.

Bequest of residue to trustees upon trust for testatrix's brother's children and M.'s children, to be equally divided between them; the dividends to be laid out by the trustees as should be most advantageous for them; but no part of the dividends to go for their board or education, but the same to accumulate for them until they come to the age of twenty-one years.

M. was herself one of the children of the testatrix's brother.

Held, that the children born at the death of the testatrix took vested interests.

Held, that the testatrix did not mean to include M. as one of the children of her brother.

MISS POLLY BULL of Cheltenham, made her will bearing date the 29th day of December, 1823, and by a codicil bequeathed half her furniture, glass, china, &c., to her neice, Mary M'Cormick Johns, and also all her clothes and her musical clock. And after giving some pecuniary legacies, the codicil thus proceeded: "And all the rest of my goods, money and effects wheresoever and whatsoever, (excepting 1,000*l.* to Henrietta Bull, daughter of my brother James,) I give and bequeath to William Lake, Esq., John Carne, sen., and William Carne, in trust for my eldest brother,

John Bull's children, and Mary M'Cormick Johns' children, to be equally divided between them for their separate use; the dividends to be laid out by the said trustees as shall be most advantageous for them, not one farthing of which is to go for their board or education, but to accumulate for them until they come to the age of twenty-one years."

Mary M'Cormick was a daughter of John Bull by a former wife, and she became of age on the 15th of April, 1825. At the death of the testatrix she had two children, and she had two others after the death of the testatrix.

*At the death of the testatrix John Bull had three [*514] children besides Mary M'Cormick Johns, and he had another after the death of the testatrix.

Mr. *Bickersteth* for the plaintiff, the administrator.

Mr. *Tinney* for Mrs. M'Cormick Johns:—She is herself entitled to a share as one of the children of John Bull. This is a gift immediately upon the testator's death, and there is nothing in the will to prevent the vesting. *Scott v. Harwood*, (a) *Davidson v. Dallas*. (b) The children who were born at the testatrix's death are those who take. I believe it is admitted on all sides that after one child has attained twenty-one, no child born afterwards can take. Now Mrs. M'Cormick Johns attained twenty-one in the lifetime of the testatrix.

Mr. *Wright* appeared for the other children of John Bull, who were born at the death of the testatrix.

Mr. *Tennant* for the two children of Mrs. M'Cormick Johns, who were born at the death of the testator.

Mr. *Garrett* and Mr. *Thompson* for the children born after the death of the testatrix.

(a) 5 Mad. 332.

(b) 14 Ves. 576.

1839.—*Bull v. Johns*

Mrs. M'Cormick Johns herself takes nothing. The testatrix plainly intended a provision for those under twenty-one or unmarried, whilst Mrs. M'Cormick Johns was a married woman at the time of the testatrix's death, and required neither board nor education. Then it is plain that this is not to be divided until the children attain twenty-one; and when there is that [*515] suspense, the *court takes advantage of it for the benefit of children born after the death of the testatrix. *Pulford v. Hunter*, (a) *Leake v. Robinson*, (b) *Gilbert v. Boorman* (c) and *Curtis v. Curtis*. (d) Mrs. M'Cormick Johns has a legacy, which is a circumstance indicating that she was to be excluded from the residuary bequest.

THE MASTER OF THE ROLLS:—It is quite plain that the testatrix did not mean to include Mrs. M'Cormick Johns,—she spoke of children who required board and education. The children born at the death of the testatrix take vested interests. There is no expression in the will that can satisfy a court that the period of division was to be postponed until the children attained twenty-one; but the testatrix meant that the fortune should accumulate. I am of opinion that the children of John Bull, born at the death of the testatrix, except Mrs. M'Cormick Johns, take vested interests. The children of Mrs. M'Cormick Johns, born at the death, also take; and they take vested interests. Costs to all parties out of the fund.

Reg. Lib. 1829, A. 1897.

(a) 3 Brown C. C. 416.

(b) 2 Mer. 383.

(c) 11 Ves. 238.

(d) 6 Mad. 14.

AN
INDEX
TO THE
PRINCIPAL MATTERS

A
ACCOUNTS.

1. The defendant engaged the plaintiff as second mate of a vessel in the South Sea whale fishery, and the plaintiff was to have a forty-fifth share of the net produce. On the return of the ship, the defendant settled with the plaintiff on the ground that he was entitled to a forty-fifth share: Held, that that was conclusive as to the share the plaintiff was entitled to. No account having been produced, and the plaintiff having afterwards discovered that several deductions had been made that were not authorized by the custom of the trade, the court directed inquiries whether the deductions made were authorized by the custom of the trade. *Spittal v. Smith*, 45

2. The master of a vessel in the South Sea whale fishery, on behalf of his owners, agrees with the officers and crew, that each shall have a specified part of the net produce of the voyage. Shortly before the return of the vessel, the owners, who were entitled to a part of the net produce, sell a quarter of the cargo at 52l per ton, on their own account. The practice of the trade is, on the arrival of a vessel, to have the cargo estimated by a ship's cooper, and the price fixed at that given in the market on the arrival of the cargo. That mode was adopted in this case, and the plaintiff, being apprised of it, settled accordingly: Held, that the owners had no right to sell a part of the cargo on their own account, they being only entitled to a share of the produce;

but the plaintiff, having settled, was too late for relief in equity: Held, also, that having settled upon the estimated quantity, although the cargo ultimately proved to amount to six additional tons, yet the plaintiff, having acted upon the estimate, he was not entitled to relief in equity. *Cockle v. Whiting*, 55

3. By the act of 59 G. III, c. 111, navy agents are entitled to make the usual charge for passing accounts before that act; and are also entitled to charge commission on the full amount of pay, without being limited by the money actually passing through their hands. *Drury v. Atkins*, 75

4. Defendants having received 450l, as two and a half per cent., returned premium on 18,000l in 1814, without bringing it to account for many years, alleging that it awaited the final adjustment of average, the court referred it to the master, to inquire whether they were entitled to retain it, according to the usage and custom of merchants. *Drury v. Atkins*, 75

See CONFIRMATION.
COPYRIGHT.
EQUITABLE RELIEF, &
PRACTICE, 1, 13, 14, 15.

ACCUMULATIONS.

1. Testator having declared that the dividends should accumulate during the life of his daughters, and until their children respectively should attain twenty-

five, when the principal should be transferred to the children, the court directed the dividends to accumulate for twenty-one years, if the children should so long live; but the court would not decide on the question of remoteness, as, if the daughters left no issue, the question would not arise, and the court will not decide a hypothetical case. *Banks v. Sladen*, 407

2. A testator had directed an accumulation for a period which might extend beyond the time limited by the Thelluson act, and it was held to be good *pro tanto*, and that during the period of twenty-one years the rents and profits were well directed to accumulate. 413, n.

ACQUIESCENCE.

See CONFIRMATION.

ACTS OF PARLIAMENT.

See PRACTICE, 460.

ADEMPMENT.

Devise of land upon trust, to sell the same, and out of the produce to pay 3,000*l.* to A. The testator sold the estate in his lifetime: Held, that the legacy was adeemed. *Newbold v. Roadnight*, 492

ADMITTANCE.

See CUSTOMARY ESTATES.

AGREEMENT.

Where there is only a proposal made, it is necessary that there should be an acceptance, but where there is a positive engagement no acceptance is necessary. Unless refused, such engagement constitutes an agreement which the court will enforce. *Palmer v. Scott*, 491

See COSTS.

COUNSEL.

FAMILY ARRANGEMENTS.

WILL, 8.

ANNUITY.

1. A testator directed that an annuity of 250*l.* should be purchased for his wife within three months after his decease.

She survived him seven months, but the annuity had not been purchased at the time of her death. Her personal representatives filed their bill for payment of the value of the annuity at the time at which the testator had directed it to be purchased, and the court decreed accordingly. *Dawson v. Hearn*, 465

2. But if an annuitant has for some time received the annual sum, the court will direct an inquiry whether the annuitant elected to take the annuity from the person who was directed to purchase it, instead of the principal sum. *Brown v. Ross*, 469

3. It makes no difference whether a certain sum be given to purchase an annuity, or a certain annuity is directed to be purchased; the court considers the annuity a legacy to the amount of its value. 469

4. But the annuitant may waive it and receive the annual sum from the executors. 469

5. The annuitant does not waive his right to have the annuity purchased, by consenting to receive the annuity until the purchase should be made. 469

See USURY.

ANSWER.

See BANKRUPT.

ANTICIPATION OF RENTS.

See INSOLVENT DEBTORS, 3.

APPOINTMENT.

See POWER.

ARRANGEMENT.

See WILL.

ASSETS.

1. It is a general rule that personal estate is first liable to the payment of mortgages in exoneration of real estate mortgaged. 136, 142, n.

2. And, next, the real estate descended

is liable, unless the debts be directed to be paid out of the land devised, and unless there be also a clear intention that the descended estates should not be subject to the payment of the debts. 142, n.

3. If there be a declaration, express words, or clear manifestation or indication upon the face of the will, that the personal estate is to be discharged from the payment of debts, the court will not disappoint the intention. Ibid.

4. The personal estate of a son on whom lands in mortgage descended is not liable to the payment of mortgage money. Ibid.

5. And the personal estate of a devisee of lands mortgaged by the deviser or his ancestors, is not liable to the payment of the mortgage money. Ibid.

6. The personal estate of the purchaser of an equity of redemption has been held to be not liable to the mortgages. Ibid.

7. Unless the intention of the purchaser appears to be to make the debt his own. Ibid.

8. The distinction appears to depend upon communication with the mortgagee, or some other act done by the party, to make the debt his own. Ibid.

9. A mortgage upon a man's estate, not of his contracting, is not considered his debt payable primarily out of his personal estate. 143, n.

10. On the other hand, a man may make a mortgage debt of his own contracting to be considered payable primarily out of his real estate; as a devise to trustees to sell and pay a mortgage thereon; but it seems that a conveyance upon trust to sell and pay debts generally does not exempt the personal estate. Ibid.

11. With respect to a devise upon trust for sale to pay debts generally, there is a distinction on this point as against different characters, legatee of personal estate and next of kin, it having been held that the personal estate, where specifically bequeathed, is exempted from the payment of a mortgage debt; but that the personal estate is subject to mortgages where it goes to the executor without any particular powers or appropriations. Ibid.

12. In order to exempt the personal

estate, the judge must be satisfied, on looking at the whole will, that it was the testator's intention to exempt the personal estate, and circumstances *dehors* the will ought not to be called in to assist the explanation; the judge will not look out of the will as to the state of the testator's affairs. 143, n.

See *LIS PENDENS*.

ATTORNEY AND CLIENT.

1. A., having purchased land, left the investigation of the title to C. and D., solicitors, in partnership. They advised that a good title could be made, and the purchase was thereupon completed. D., the solicitor, was a trustee in the conveyance, to bar dower. A. dies, and his devisee sells the property to D., one of the solicitors. D. did not object to the title until eight months afterwards. In his answer he said he had no recollection of the title: Held, that a solicitor, who has been employed to advise on a title to property, could not, on purchasing it himself from his client, set up an objection to the title which he did not think of any importance when advising his principal. Decree for specific performance. *Beever v. Simpson*, 69

2. An attorney having been employed to purchase an estate for his client, entered into a contract in his own name, the fee was conveyed to him, and he insisted upon holding it in his own right: Held, that the attorney was a trustee for the client; and decreed that the attorney convey to his client, the plaintiff, upon payment of the purchase money. *Lees v. Nuttall*, 282

3. A solicitor having purchased a property of his client at an under value, the client, eighteen years afterwards, brought his bill to set aside the sale. The court was of opinion that a solicitor dealing with his client was bound to show that he had given his client the price which he would have advised him to accept from another person; but the plaintiff having failed to show that he was not in a situation during the time which had elapsed to seek relief, the court dismissed the bill, but without costs. Mere evidence of embarrassment is not sufficient. *Semble*. Had the plaintiff applied to the court in a reasonable time, or had the court been satisfied, by evidence, of his total inability to take proceedings in

this court before, he would have had relief. *Champion v. Rigby*, 421

See MORTGAGE, 7.

B

BANK ANNUITIES.

A testator having given four per cent. stock, and he not having as much at the time of his death, by reason of the reduction of interest in one of the four per cent. stocks to three and a half per cent. by act of Parliament: Held, that the legatee was entitled to his legacy in the existing four per cents. *Banks v. Sladen*, 407

BANKRUPT.

1. A bankrupt had been made a party defendant in a suit after his bankruptcy. He set up a claim, on his answer, to a life interest under the settlement on his marriage; yet it being manifest that he had no interest, all his estate having passed to his assignee, who was before the court, the court dismissed the bill as against the bankrupt, with costs. *Bennett v. Low*, 238

2. A commission was issued against two partners. Subsequently a commission was issued against one of them and three other persons. This latter commission was then superseded as to the partner who was included in the first commission, without prejudice as to the other three bankrupts. The assignees under the second commission sold an estate belonging to one of the three partners; the purchaser objected, that the second commission was altogether void, but the court held that it was a good commission, not only in equity, but at law, and made a decree for specific performance. *Burton v. Wall*, 113

3. The 16th section of the bankrupt act was made for the purpose of giving validity to a commission of bankrupt which in its origin was not valid. 118

4. The Master of the Rolls has no authority to reverse the Vice-Chancellor's order to supersede a commission of bankrupt, or to rehear the order. *Burton v. Wall*, Ibid.

See FINES FOR RENEWAL
HUSBAND AND WIFE.

INSOLVENT DEBTORS.
MORTGAGE, 3, 5.

BEQUESTS.

See ASSETS.
WILL.

BONDED WAREHOUSES.

See INTERPLEADER.

BOUNDARIES.

1. Where a plaintiff shows a title to some land and a confusion of boundaries, he is entitled to a commission or an issue; the court may direct either. In this case a commission was directed. *Godfrey v. Littell*, 221

2. Freehold and copyhold being intermixed, the court directed a commission. *Norris v. Le Neve*, 234

3. A commission ordered to distinguish freehold from allotments under an enclosure. *Millard v. Panconst*, 235

4. And to distinguish freehold from customary. *Robinson v. Hodgson*, 235

5. To distinguish freehold lands. *Attorney-General v. Bowyer*, 286

6. To distinguish manors. *Clifton v. Gwynne*, Ibid.

C

CESTUI QUE TRUST.

See FINES FOR RENEWAL.
MORTGAGE, 3.

CHARITIES.

1. A., by her will, gave 7,000*l*. to the governors of Christ's Hospital, upon trust, for certain specific charities, and to pay certain annuities, and to apply 40*l*. per annum to the scholars of Christ's Hospital. In case the governors refused to accept the trust, then the 7,000*l*. was given to the trustees of the Rev. William Hetherington's charity, for the like trusts, except as to the 40*l*. per annum, which was to be applied to the purposes of the latter charity. The testatrix also gave 2,000*l*. to the University of Oxford. The governors and trustees refused to accept

these trusts, and the legacy of 40*l*. per annum. The university also refused to accept the legacy of 2,000*l*.: Held, that whenever a charitable legacy, from whatever cause, fails, the crown has a right to interfere, and that the legacies of 2,000*l*. and 40*l*. per annum must be applied to such charitable purposes as the crown shall direct: Held, that as to the 7,000*l*., a reference be made to the master to appoint new trustees. The bill dismissed, as against the governors, trustees and university. *Denyer v. Druce*, 32

2. Legacies were given to the "Guernsey Hospital;" there was not in fact any hospital of that name, and the court refused to apply the funds. *Stinson v. Barber*, 14

3. Where a charitable object fails, from whatever cause, the crown has a right to interfere. *Ibid.*

4. The crown must signify the charitable purpose to which the fund shall be applied. *Ibid.*

5. The court orders a legacy to a foreign charity to be paid over, as it will not administer the funds of a foreign charity. Legacies to charities in Ireland are administered by commissioners there, under an act of the Irish Parliament. *Collyer v. Burnett*, 79

6. The Statute of Mortmain does not extend to money given to Scotch charities to be invested in land in Scotland. 80, n.

7. The mayor, bailiffs and burgesses of Berwick-upon-Tweed, in consideration of 50*l*., left by will, for the erecting and maintaining of a house of correction there, by feoffment, dated 28th May, 1653, conveyed the moiety of a property there to the churchwardens and overseers, for the erecting and maintaining of a house of correction within the borough, and for maintaining and ordering the poor therein forever, and all other sturdy and idle persons coming and being therein, and for the getting them and every of them to work. By another feoffment of the same date, in consideration of 350*l*. owing by them to the poor, the mayor, &c., conveyed the other moiety, and some other lands, for the like purposes: Held, that this town never having at this time raised poor rates, under the statute of Elizabeth, these were gifts in aid of the poor rates.

As to a part of the lands, the rents of which had been duly applied down to the eighteenth century, when their applica-

tion ceased for the use of the poor, and was wholly carried to the corporate chest; the court, being satisfied upon the evidence that it was intended to be comprised in the second feoffment, declared it to be a part of the charity, and that the rents should be accounted for from 1823, when the same were claimed for the use of the poor; and the rents thereof were also declared to be applicable in aid of the poor rates.

The costs of the relators to be taxed as between party and party, and paid by the mayor, bailiffs and burgesses. The extra costs of the relators to come out of the fund. *Attorney-General v. Corporation of Berwick-upon-Tweed*, 239

8. A legal fee cannot be created in individuals without the use of the word "heirs," or some equivalent expression; but, with respect to charitable trusts, the court does not adhere to form. 246

9. Gifts in aid of the poor are not generally gifts in aid of the poor rates. *Ibid.*

10. Testator directed the produce of his real and personal estate to be invested. Part of the personalty consisted of mortgages and securities on real and leasehold estates; part consisted of a sum of money due on a covenant to sell a freehold house. Testator gave various legacies to charities. He also gave the residue to charities. Held void as to the mortgages and money due on the sale of the freehold. The charities to abate *pro rata* in respect of the legacies and residue. *Harrison v. Harrison*, 273

See CONDITION.

CHILDREN.

Who take by that description, 273, 425

See POWER.

CHRIST'S HOSPITAL.

See CONDITION.

CODICIL.

See WILL.

COMMISSION.

See ACCOUNTS.
BOUNDARIES.

CONDITION.

In 1724 a testator gave 400*l*. per annum to the governors of Christ's Hospital, upon condition that they received four boys or girls annually, to be nominated by the relators.

The governors received the income and the nominees until 1827, when they passed a resolution that they would no longer receive them.

Held, that this was a gift upon condition, and, having accepted the gift, they were bound to the condition. *Attorney-General v. Christ's Hospital*, 393

See VENDOR AND PURCHASER, 7.

CONFIRMATION.

1. A merchant, being abroad, empowers certain persons in this country to receive moneys, adjust claims and do some other acts. Money being wanted by the firm here, of which he was a partner, these attorneys deposit the deeds with the Hope Insurance Company, to secure 12,000*l*., and covenant that he shall execute the mortgage; this 12,000*l*. was also secured by the bonds of sureties in sums corresponding to the shares of the partners: Held, that the power of attorney was not a sufficient authority; but the merchant, on his return to this country, having written a letter to the Hope Company, requesting the loan of 6,000*l*., "to be secured on my Essex property, which you now hold, in addition to the 12,000*l*. already advanced;" and professing his readiness to execute the mortgage deed: Held, that this was a confirmation of the security. Some of the parties having paid the amount of the sums secured by them: Held, that they had a lien on the property. One of those sureties being a partner: Held, that the sum paid by him was subjected to the partnership accounts. *Munnings v. Bury*, 147

2. Held, that acquiescence in a transaction cannot be maintained, unless it be shown that the party whose interests are affected knew not only the facts which affected his interest, but the legal effect of those facts upon that interest. *Cockerell v. Cholmeley*, 435.

3. Acquiescence does not cure a defect, where the party was at the time wholly ignorant of rights which were in him, 445

CONSIDERATION.

1. Inadequate consideration is no

ground for relief in equity in respect to the sale of a property in mortgage to the mortgagee, although the mortgagor be in distress, if no advantage be taken. 31

2. But it is a ground for making void a sale of a reversion, and there it is incumbent on the purchaser to prove the value. 368

See POWER.
REVERSIONS.

CONSTRUCTION.

Circumstances *dehors* a will ought not to be called in. 143, n.

CONTRIBUTION.

See LIS PENDENS.

COPYHOLDS.

In two manors in Durham, there is no custom for surrendering to the uses of the will, but the tenant divests himself of the legal estate, and by surrender vests it in a trustee, who subscribes a memorandum or defeasance, that the surrender is to the uses of the surrenderor's will. In this case the father and maternal grandfather of the testator, R. N., being both copyholders, had respectively caused their copyhold tenements to be surrendered to the other, who had subscribed the usual defeasance. The legal estate in both descended to the testator. But with regard to the tenements in the manor of Houghton, they were devised by the father of the testator to trustees, to the intent that his widow might receive an annuity thereout, and subject thereto to the testator, R. N., in fee. The widow being alive at the time the testator, R. N., made his will, and died, it was held, that the copyholds in the manor of Houghton passed by his will.

With respect to the tenements which were in the other manor, the testator's maternal grandfather, who had the beneficial interest in them, devised them unto trustees, upon trust for the testator, R. N.: Held, that there being nothing to separate the legal and equitable interest, the equitable interest had merged in the legal estate in the testator, and could not be devised by him according to the custom of the manor: Held, that his widow was entitled to free bench, and the heirs, subject thereto, to the inheritance, but they

taking benefits under the will, were bound to elect. *Nicholson v. Nicholson*, 319
 cipal and interest due to him on the mortgage. *Peake v. Gibbon*, 505

See CUSTOMARY ESTATES.

HEIR AT LAW, 6.

COPYRIGHT.

1. The court does not give an account of the sale of a pirated copy of a work, unless it grants an injunction. The injunction is the ground of the account. That injunction may be granted at the hearing. The account is consequential.

The court will not grant an injunction after a considerable lapse of time; and where piracy was only of a small part of a work, and was of itself a matter of calculation, the court was of opinion that to interfere would not be a fair exercise of its jurisdiction. *Baily v. Taylor*, 295

2. With respect to a work of calculations, if there were previously similar calculations, yet if they were calculated by the author, although calculated by another person before him, they are a work of computation as to which he is to be protected by statute. 299, n.

3. A work published in 1811, the court would not prohibit by injunction in 1829.

COSTS.

1. If a plaintiff insists upon what he is not entitled to, whilst the defendant has been ready to perform the agreement really entered into, the defendant is entitled to costs. *Bass v. Clively*, 80

2. It is frequently the practice to give costs against the plaintiff who has a decree, when the costs have been incurred by his fault. 84

3. Costs were refused to an heir at law, he having conveyed his interest to two of his sisters. *Barton v. Croxall*, 164

4. *Quere*, if a town clerk, party to a bill of discovery, is entitled to his costs (a) 249

5. The provisional assignee is entitled to his costs from the mortgagee, in a suit for foreclosure by the mortgagee, who will be allowed to add them to the prin-

(a) In the case here referred to, the decree has been drawn up, and costs are not given to the town clerk.

See BANKRUPT.

CHARITIES, 7.

EQUITABLE RELIEF, 4.

EXECUTORS, 7, 9.

FRAUD.

HEIR AT LAW, 8.

HUSBAND AND WIFE, 2.

INSOLVENT DEBTORS.

TRUSTEES, 6.

COUNSEL, CONSENT BY, IN COURT.

1. Where such consent has been signed by counsel on both sides, it lies on the party impeaching it to disprove it. 43

2. In the absence of evidence, the court will conclude that counsel had authority; for it is not to be presumed that counsel would enter into an agreement without authority. 44

CROSS REMAINDERS.

An estate being devised in remainder to daughters in tail, and in default of issue, then over: Held, that nothing went over until there was a general failure of issue of all the daughters, and consequently that there were cross remainders between them. 464, 465

CROWN, RIGHTS OF.

See CHARITIES, 1, 3, 4.

CUSTOMARY ESTATES.

A lord of a customary manor, for life only, purchased a tenement in the manor in fee by conveyance and surrender. The mode of transmission of lands in the manor was by conveyance and surrender. The lord died, leaving only a daughter. The manor, by the settlement under which he held it for life, was limited, in default of sons, in remainder to his brother; and the manor went over to the brother: Held, that the usual mode of passing estates being by common law conveyance, the freehold was in the tenant. Held, that on the death of the lord the tenement descended to his daughter, the heiress at law; she would require admittance to perfect her title. *Bingham v. Woodgate*, 183

See HEIR AT LAW.

D

DEBTS.

See ASSETS.

DEED.

See EQUITY.

DEVISE.

See ASSETS.

DISTRESS.

*See FRAUD.***E**

ELECTION.

See ANNUITY.
COPYHOLDS.

EQUITABLE RELIEF.

1. A testator having devised lands to be conveyed to his son for life, with remainder to the second and other younger sons of his son in tail, and the court, being satisfied from the whole will that the testator intended that, after the death of his son, the first son of that son should have an estate tail conveyed to him, decreed accordingly. *Langston v. Pole*, 119

2. A court of equity has no jurisdiction to correct a mistake in an instrument, where the parties have proceeded upon error in point of law. 443

3. The only jurisdiction a court of equity has for correcting mistakes in deeds, is where the drawer of the instrument, the mere agent and instrument who has prepared the deed, has mistaken the intention of the parties to the deed. *Ibid.*

4. A. agreed to lend B. 600*l.*, navy five per cent. stock. He sold the stock for 522*l.*, which he paid to B. A bond is drawn by an unprofessional man, to repay "the sum of 522*l.*, (being the produce of 600*l.* stock, five per cent. navy, or such other sum as would replace the stock,) with lawful interest." A sum equal to the dividends was paid half-yearly; but B., on discharging the bond, refused to

transfer the stock, and would only pay the money received by her; to this A. objected, but at length received it, and gave up the bond, remonstrating on the injustice of the proceedings, but being told, at the same time, that the money would only be paid in discharge of the bond: Held, that A. had no relief in equity; he should not have received the money, unless the party paying it had agreed that the remedy should remain open; but costs were refused. *Barnham v. Munn*, 84

See ATTORNEY AND CLIENT.
CONSIDERATION.
FRAUD.
MORTGAGE.
SPECIFIC PERFORMANCE.

EVIDENCE.

The deposition of an admission of a residuary legatee and executrix is good evidence, it being against her own interest. *Neathway v. Ham*, 316

See COUNSEL.

EXCEPTIONS.

1. Cannot be taken to a report of good title, on the ground that the heir at law was not a party to the suit. 3

2. The eighth of Lord Lyndhurst's orders applies only to answers to exceptions. 433

EXECUTORS AND ADMINISTRATORS.

1. Executors, having contracted to purchase land, sell out stock and deposit the produce at a banker's, when the purchase seems to be near completion. They are not liable to make good the money if the bankers fail. *France v. Woods*, 172

2. One of several executors receiving part of the personal estate, which he hands to his co-executor, who wastes the estates, still remains personally liable; but because he happens to be executor, he is not liable for moneys which he received for the purchase of a freehold estate of the testator, and which he received as the agent of another person empowered by the will to sell it, to whom he had paid over the amount, but is perfectly justified in so paying it over. *Devins v. Spurling*, 199

3. If one executor receive part of the personal estate, and afterwards hand it over to a co-executor, who wastes the property so handed over to him, the former is personally liable for the abuse of trust by the other executor. 210

4. Executors depositing moneys belonging to the estate, with the same persons as the testator entrusted with his money in his lifetime, although they are not bankers, are not liable for a loss sustained by their bankruptcy. *Dorchester v. Effingham*, 279

5. An executor is not liable unless he acts from corrupt motives or *crassa negligentia*. 281

6. It is not the practice of the court for executors themselves to apply to pay money into court. *Ibid.*

7. A person appointed with another executor, and who disclaims, but who does some acts as a friend of the family, is not to be considered to have acted as an executor, and a bill against him as such would be dismissed, with costs. *Dover v. Everard*, 376

8. An administrator having claimed his debt before the master, that is sufficient to entitle him to retain it. *Winter v. Hicks*, 475

9. Administrator entitled to his costs out of the produce of the sale of a real estate his intestate having been a trader. 475

See ANNUITY.

FEME COVERT.

HUSBAND AND WIFE.

LEGACY.

EXECUTORY BEQUEST.

1. Gift to a wife, and if she make no disposition of it, then over: Held, an absolute gift. *Bourn v. Gibbs*, 414

2. In some older cases the question seems to have been influenced by the fact, whether the first taker had or had not exercised an absolute power over the property, or shown an intention to make it absolutely his own. 415, 416, n.

See ACCUMULATIONS.

WILL.

EXTINGUISHMENT.

Takes place only when both estates have the same duration; and where a lord for life purchased customary estates in the manor in fee, it was not an extinguishment, but it was a suspension of the seignory during the life of the lord, and this seignory would necessarily survive to the remainder-man on the death of the lord, when also the customary tenement would descend to the heir of the lord. 198

See CUSTOMARY ESTATES.

F

FAMILY ARRANGEMENTS.

The court does not attend to points in family arrangements which it requires in other agreements. 294

FEME COVERT.

1. Stock was settled on marriage to the separate use of the intended wife, and afterwards as she should appoint. She assigned her life interest to two persons for certain purposes, and appointed the capital to the same purposes. Decreed, that the trustees transfer the stock accordingly. *Lynn v. Ashton*, 323

2. Bequest to a married woman to her separate use. The court would not order payment into her hands, but ordered the legacy to be carried to her account, with liberty to apply. *Owen v. Lys*, 404

See HUSBAND AND WIFE.

WILL, 3, 20.

FINE.

See HUSBAND AND WIFE.

FINES FOR RENEWAL.

T. H., by his will, devised certain freehold and leasehold property to a trustee, upon trust, to permit his son, T. E. H., to receive the rents during his life, subject to the payment of rents and performance of the covenants reserved and contained by and in the present or future leases, whereby the leasehold premises were or should be held; and also all taxes, fines and expenses attending the same; remainder upon trust for the sons of T. E. H. in fee,

as tenants in common. The tenant for life became bankrupt, and afterwards died. His assignees recovered from a mortgagee of the bankrupt a sum of 2,000*l.*, which he had received as rents under a mortgage of this property, which he took with a knowledge of the insolvency of the bankrupt. The sons of T. E. H. brought their bill to have the fines paid out of the rents: Held, that these rents were to be considered as received subsequent to the bankruptcy, and as such liable to the fines for renewal. *Hulks v. Barrow*, 264

FOREIGN CHARITIES.

See CHARITIES, 5.

FRAUD.

1. J. S. M., was entitled to the dividends of 4,300*l.* for life, with a power to appoint by any deed or writing the principal after his death, and, in default of appointment, to his next of kin. J. S. M. being in prison for debt and in great distress, is prevailed upon by H. C. to enter into an agreement for sale of the principal after his death, in consideration of 1,000*l.*, and other sums therein stated to have been previously lent and advanced to him by H. C.

By a subsequent deed, in consideration of 1,854*l.*, therein stated to be due from J. S. M. to H. C., and of 1,000*l.* paid by J. L. M. and others, J. S. M., by the direction of H. C., appointed that the principal should on his death be transferred to J. L. M. and others, with a proviso that they should assign the same to H. C. on payment of 1,000*l.* and interest, and all further advances. The 1,854*l.*, or any part of it, had not in fact been advanced by H. C.: Held, that this was a clear fraud: Held, that the appointment was well executed: that the next of kin of J. S. M. had no claim: that H. C. was a trustee for the personal representatives of J. S. M. for the excess beyond the money received by J. S. M.: that H. C. should pay costs. *Mellor v. Minel*, 481

2. Accounts having been settled and a release executed, fraud or surprise must be shown in order to impugn either. 199

See PRACTICE, 25.

FREE BENCH.

See COPYHOLDS.

G

GIFT.

See PRACTICE, 9.

GRANDCHILDREN.

See WILL.

GUARDIANS.

1. The father of illegitimate children has no authority to appoint guardians for them by will. *Mills v. Roberts*, 476

2. The court will appoint guardians. *Ibid.*

H

HEIR AT LAW.

1. A., by will, directed his debts to be paid out of his personal estate, and the deficiency to be made up out of the real estate. The heir at law must be a party. The will cannot be declared to be well proved in his absence. *Fordham v. Rolfe*, 1

2. Where the heir at law, by reason of his being out of the jurisdiction, is not before the court, the court will merely decree the trusts of the will to be carried into execution; and if the decree be that the will be established, the heir at law being absent would not be bound. 3, n.

3. But it is not a good exception to a report of good title that the heir at law is not a party. 3

4. The heir at law should be made defendant, and not co-plaintiff, when any deed, will, &c., is to be proved against him. *Ibid.*

5. A constructive trust is not within the statute 6 G. IV, c. 74, enabling infant trustees to convey. 4

6. A person who was entitled to a copyhold on the death of his mother, having covenanted to surrender it to trustees for the benefit of his creditors, died without having been admitted, leaving an infant his heir at law: Held, that the legal estate vested in the infant, and that she was not within the statute 6 G. IV, c. 74.

10, 11, n.

7. An heir at law, having in his answer admitted the due execution of the will and the sanity of the testator at the time of making it, the court will infer that he had made every necessary inquiry in order to obtain information before he made the admission, and the court will not allow a succeeding heir to dispute the will, nor will the court direct an issue *devisavit vel non*. *Livesey v. Harding*, 463

8. The heir at law is entitled to his costs in a creditor's suit from the plaintiff, who may be reimbursed out of the fund in court, without prejudice to the costs of the administrator. *Winter v. Hicks*, 475

See ASSETS.

COSTS.

CUSTOMARY ESTATES.

EXTINGUISHMENT.

HERITABLE BOND.

1. A., being entitled to a Scotch heritable bond, devised it with other property. The heritable bond does not pass, but descends to the heir at law. It is immaterial that there is also a personal obligation. The debt still retains its real character as the *jus mobilis*. *Jerningham v. Herbert*, 103

2. A heritable debt is not changed into movable by an accessory movable security. 112, n.

HUSBAND AND WIFE.

1. The wife of a bankrupt was entitled, under the will of her grandmother, to a moiety of certain public funds on the death of her mother. Her husband became bankrupt; then the wife died; then the mother died. On a bill filed by the assignees of the bankrupt against the executrix of the grandmother and the administrator of the wife of the bankrupt: Held, that the bankrupt having survived his wife, the assignees became beneficially entitled. *Harper v. Ravenhill*, 144

2. On a marriage, the father of the wife purchased 1,000*l.* consols, and the same was vested in trustees, to pay the dividends to the wife for her life; and then trusts were declared for the children of the marriage, under which the court had decreed, in a former suit, that the only child of the marriage, a daughter, took a vested interest. This daughter married J. M., and died in the lifetime of the

mother, leaving J. M. her surviving. J. M. did not take out administration to the effects of his deceased wife, and afterwards died: Held, that his executors were entitled to the 1,000*l.* consols, and that the representatives of the wife were not entitled. One of J. M.'s executors, who was a defendant, having colluded with the other defendant, the personal representative of the wife, the court gave costs against both of them. *Platt v. McDougall*, 390

3. Land purchased by the husband, subject to a mortgage, with the money of a half sister of the wife, was on the marriage settled on the husband and wife for their lives, and the life of the survivor of them, remainder to the heirs of the body of the wife; remainder to the right heirs of the husband. The husband having died, the widow and eldest son sold and conveyed part of the lands, and the son alone levied a fine. Many years afterwards, the eldest son being dead, the widow also levied a fine to the use of the purchaser: Held, that the property was not within the spirit of the statute 11 H. VII, c. 20; and that the plaintiffs, who were the issue of the second son, were barred by the fine, with proclamations of the widow. *Watkins v. Lewis*, 447

See SPECIFIC PERFORMANCE, 1.

I

INDULGENCE.

See VENDOR AND PURCHASER, 7.

INFANT HEIR.

See TRUSTEES, 1, 2.

INJUNCTION.

See COPYRIGHT.

INSOLVENT DEBTORS.

1. A person who had been twice discharged by the court for the relief of insolvent debtors, died possessed of considerable property: Held, that this court could administer the fund: that first the creditors subsequent to the second insolvency should be paid; then those after the first insolvency; and, lastly, those before the first insolvency. *Barton v. Tattersall*, 378

2. The Statute of Limitations does not affect the creditors of an insolvent mentioned in his schedule for the debts therein stated, in respect of the time elapsed since his discharge. 380

3. A testator gave a dwelling-house and a piece of land to trustees upon trust, to receive the rents and apply the same for the board, lodging, maintenance, support and benefit of the testator's son, as they should think proper, for his life; and the application thereof, for the benefit of the son, was to be at the entire discretion of the trustees; and the son was not to have the power in any way to sell, mortgage or anticipate the rents. The son took the benefit of the act for the relief of insolvent debtors. The plaintiffs were his assignees. The court decreed a conveyance to the plaintiffs. Trustees to retain their costs as between solicitor and client. *Green v. Spicer*, 396

INTERPLEADER.

Warehousemen being private agents, and not holding goods as the possessors of a public bonded warehouse, cannot maintain a bill of interpleader. But where goods are deposited in a public bonded warehouse, a bill of interpleader may be maintained against the contending claimants. *Cooper v. De Tastet*, 177

IRELAND.

See CHARITIES, 5.

ISSUE.

See BOUNDARIES.

L

LEASEHOLD.

See FINES FOR RENEWAL.

LEGACY.

In 1752, a testator gave a legacy to a boy on his attaining twenty-one. The legatee went to America at an early age, and had not been since heard of. On a bill by the personal representatives of the boy, the court directed an inquiry whether

he attained the age of twenty-one years, and whether he was living or dead, with liberty to report special circumstances. *Hudson v. Twining*, 315

See ANNUITY.

CHARITY.

LEGATEE.

1. A legacy having been given to a legatee, in a name which she had for many years assumed, the court directed an inquiry, who was the person meant. *Neathway v. Ham*, 26

2. When the identity of a legatee is doubted the court directs an inquiry. 32

See EVIDENCE.

FEME COVERT.

LIFE

See CONFIRMATION.

MORTGAGE.

VENDOR AND PURCHASER, 1, 3.

LIS PENDENS.

A testator gave lands to A. in strict settlement, and a manor to B. in strict settlement. On his death a creditor's bill was brought for the administration of assets, and, it appearing that the testator owed a debt on mortgage, and some specialties, the master was directed to ascertain what proportion the properties contained in the several devises ought to bear, and to raise the amount by sale or mortgage. The master sold the manor and lands. The title to the lands was completed, and the purchase money paid, but no good title could be made to the manor. The report was confirmed in 1796. B. continued in the possession of the manor, and never paid the contribution; and in 1824, he and his eldest son having suffered a recovery, sold it to J. F. In 1825 A. died, and in the same year his eldest son, tenant in tail, filed his bill against B., and his eldest son, and the purchaser: Decreed, that this was a purchase *pendente lite*; and the contribution reported by the master to be paid from the estate devised to B., with interest and costs, was ordered to be raised by sale and mortgage, and paid to the plaintiff. *Kinsman v. Kinsman*, 399

M

MAINTENANCE.

1. The court will not give past maintenance for infants to a father, but it will give future maintenance when the father is not of ability to maintain them. *Simon v. Barber*, 22

2. The court directed interest to be paid on legacies to two natural children of the testator, who were infants, from his death, and the master was directed to inquire what would be fit to be allowed for their maintenance and education for the time passed since the death of the testator, and the time to come. *Mills v. Roberts*, 480

See TRUSTEES.

MANOR.

See CUSTOMARY ESTATES.
EXTINGUISHMENT.

MARRIAGE.

1. Marriage with a sister of a deceased wife only voidable, and not questionable, after her death. 388

2. The court will direct an inquiry as to a marriage in Scotland. *Ibid.*

MERCHANTS (CUSTOM OF.)

See ACCOUNTS.

MERGER.

See COPYHOLDS.
CUSTOMARY ESTATES.

MISTAKE.

See EQUITABLE RELIEF.
POWER, 1.
WILL, 5, 8.

MORTGAGE.

1. Inadequate consideration is no ground for relief in equity in respect to the sale to the mortgagee of the property in mortgage, although the mortgagor be in distress, if no advantage be taken of it. 81

2. Devise of lands, subject to 1,000*l.* to be raised for the testator's daughter, to an annuity of 37*l.* 10*s.* to his widow, and to all such incumbrances as might happen to be thereon, does not exempt the personal estate from the payment of a mortgage thereon. The personal estate is the primary fund for the payment of debts. *Phillips v. Parker*, 136

3. A *cestui que trust* for life of leaseholds, subject to fines for renewal, mortgaged his interest, and the mortgagee entered into possession and received the rents. The *cestui que trust* afterwards became bankrupt. His assignees commenced an action against the mortgagee for the rents, and at the trial the jury found that he took the mortgage with a knowledge of the insolvency of the *cestui que trust*, and found a verdict for the plaintiffs for the amount of the rents received by him. The *cestui que trusts* in remainder filed their bill against the mortgagee and the assignees, praying that they might be compelled to pay all fines; but the court was of opinion that, after the action at law, the mortgagee was not answerable for the fines for renewal. *Hulks v. Barrow*, 264

4. Twenty years are not an absolute bar to the mortgagee. It is merely a case of presumption, which may be rebutted. *Stewart v. Nicholls*, 307

5. A mortgage was made in 1790, and the mortgagor became bankrupt in 1794; there were several prior mortgages. The court would not, in 1829, presume this debt satisfied. 312

6. The court will not give relief, if there has been an adverse possessor for twenty years. 313

7. An attorney, having received money for his client, and being owed on mortgage from another person the sum of 3,000*l.*, wrote to his client that he had that mortgage in his hands, and having received the like amount for the client, he undertook, when thereunto required, to execute a transfer of the same: Held, that this was not mere proposal, and although there was no express acceptance, yet there being no refusal of the security, the client was entitled to all such interest as the attorney had therein. *Palmer v. Scott*, 488

See ASSETS.
CHARITIES.
CONFIRMATION.

SPECIFIC PERFORMANCE, 2.
VENDOR AND PURCHASER, 7.

MORTMAIN.

Gift by will to a charity of money, due on a covenant to sell a freehold house, is within the Statute of Mortmain and void.

273

See CHARITIES.

N

NAME.

See LEGATEE.

NAVY AGENTS.

See ACCOUNTS.

NEXT OF KIN.

See FRAUD.

NOTICE.

1. Notice to an agent is notice to his principal, but it must be in the character of agent.

176

2. A suit pending is notice to a purchaser.

399

P

PARTIES.

1. A. by will directed his debts to be paid out of his personal estate, and the deficiency to be made up out of his real estate; and subject thereto he devised his copyhold messuages. Testator died; a creditor's bill was then filed, but neither the heir at law nor any personal representative were parties; in fact, the will had not been proved; there was no personal estate: Held, that administration, *cum test. annexo*, must be taken out, and that the administrator and heir at law must be parties. Bill to be so amended. *Fordham v. Rolfe*,

1

2. A testator, by his will, gave a legacy to a boy on his attaining twenty-one. The boy went to America, and his legacy had been handed to the defendant, in whose hands it had accumulated. On a bill by the personal representatives, it was

suggested that the representatives of the original testator ought to have been parties, but the court did not think they were necessary parties. *Hudson v. Twining*,

315

3. A party having purchased land, and signified at the time that he made the purchase on behalf of the trustee in his marriage settlement, who had money vested in him to be laid out in land, and a bill being filed against him for specific performance, the court would not allow the cause to proceed until the trustee was made a party; and the cause stood over for that purpose. *Wynnial v. Linda*,

512

See EXECUTORS, G.

HEIR AT LAW, 2, 3, 4.

PARTITION.

1. A testator devised his moiety of an estate, and then made partition with his co-tenant; on this, the estate was conveyed to a trustee as to one part, to the use of the testator in fee; and a mortgage term, created by the co-tenant in his moiety, was assigned to attend the inheritance: Held, that this was not a revocation of the will. *Barton v. Croxall*,

164

2. A mere partition does not revoke a will.

171

PARTNERSHIP.

1. Mines, are, for many purposes, partnership property. They are liable to the debts of the partnership, and debts to the partnership; and notwithstanding the bankruptcy of a partner indebted to the partnership, the accounts are to be taken beyond the time of the bankruptcy, up to the time of the sale; the debts of the partnership are first to be satisfied, and out of the bankrupt's share, repayment is to be made to the co-partnership of what is due to it from him. *Fereday v. Wightwick*,

250

2. The sixteenth section of the bankrupt act was made for the purpose of giving validity to a commission of bankrupt, which in its origin was not valid, by enabling the Lord Chancellor to supersede the commission as to one partner. *Burlton v. Wall*,

118

3. All property, whether real or personal, is subject to a sale on a dissolution of the partnership.

261

4. Property acquired by a partnership is subject to all the debts of the partnership, and to the debts of one partner to the other partners in respect of the partnership. 261

5. Payment by a client to one of two partners, after the partnership has been dissolved, is a good payment, unless there be notice to the debtors of the partnership that partnership debts are to be paid in a particular manner. If the debtor permits one of such partners to receive moneys due to him, in the confidence that those moneys, when received, will be a satisfaction of the partnership debt, the retainer of those moneys is equivalent to an actual payment. *Pritchard v. Draper*, 332

6. The plaintiff and defendant held some powder mills on a lease, which would expire in 1831. The plaintiff filed his bill for a dissolution of the partnership; it was objected by the defendant that the partnership must last during the lease, but the court held the partnership dissolved from the time stated in a notice given by the plaintiff to the defendant. *Alcock v. Taylor*, 506

See ACCOUNTS.

BANKRUPT, 2.
CONFIRMATION.
PRACTICE, 1, 2.

PAYMENT.

See EQUITABLE RELIEF, 4.

PERSONAL ESTATE.

See ASSETS.

PERSONAL REPRESENTATIVES.

Those words mean executors and administrators. *Saberton v. Skeels*, 383

POOR RATES.

See CHARITIES.

POWER.

1. Sir H. E., by his will, devised his lands to trustees, to the use of his eldest son for life, *sans waste*, and in strict settlement, with remainders over, under

which the defendant ultimately became tenant in tail in possession, and the testator gave his trustees a power of sale, with the consent of the tenant for life. The lands were sold for a price fixed, exclusive of the timber, which was valued, and the amount of the valuation paid to the tenant for life. By the conveyances the surviving trustees, in consideration of the price fixed, conveyed the land to the purchaser; and the tenant for life, in consideration of the value of the timber, which had then been determined, conveyed the timber to the purchaser: Held, that this was a bad execution of the power in a court of equity. The plaintiff having endeavored to show that there was, in the letters which passed prior to the conveyance, an agreement for the sale of the estate and timber, without any stipulation that the price of the latter should be paid to the tenant for life, pressed the court to aid the execution of the power; but the court, being of opinion that there was not such an agreement, and that it was understood by the parties that the tenant for life was to receive the value of the timber, and that the drawer of the instrument had not mistaken the intentions of the parties, refused to aid the execution of the power. *Cockerell v. Cholmeley*, 435

2. A testator directed trustees to sell his real and personal estate, and pay the amount of the produce to his wife, trusting that she would provide for his family, and at her decease that she would give and bequeath the same to her children by him, as she should appoint. The widow, by will, made an appointment to five of her seven daughters: Held, that the appointment was void, all the children being entitled to the benefit of the fund: Held, that the widow could only execute the power by will, and that only such of her children took an interest as survived her, and consequently that the representative of a child who died before her could not take any part of the fund. *Walsh v. Wallinger*, 425

3. Powers generally require certain formalities in the mode of execution; and if there be a valuable consideration, the court will aid the defective execution of a power. 442

4. Where a person has a general power of appointment, and he duly executes it, but the court subsequently deprives the appointee of the benefit of it, on the ground of fraud upon the appointor, yet the court will not declare the appointment void in favor of the persons entitled in re-

remainder, in default of appointment, but will decree that the appointee is a trustee for the personal representatives of the appointor. *Mellor v. Minet*, 481

See FRAUD.
WILL, 3.

POWER OF ATTORNEY.

See CONFIRMATION.

PRACTICE.

1. Although a decree in a suit for the administration of the assets of a testator direct that all accounts be taken, some of the masters will not take the accounts of a partnership unless specially directed so to do. *Woolley v. Gordon*, 11

2. But the court will direct an inquiry whether there was a partnership, and if the fact be found in the affirmative, that the accounts be taken. 13

3. And the court will direct this on the petition of a party, after the usual decree has been made, under special circumstances. *Ibid.*

4. The father of infants had maintained and educated them since the death of their mother, when they became entitled to a sum of money in this court. The father petitioned for a reference to the master on the subject of maintenance and education of the children, and for an allowance, as well for the time past as in future; but the court refused to make any reference to the master with respect to the maintenance of the infants in the time past, but made the usual reference with respect to their future maintenance out of the funds, in case the father himself was not of ability to maintain them. *Simon v. Barber*, 22

5. But, except in the case of a father, the court will direct past and future maintenance. 480

6. The court refused to allow a petition to be amended to substitute another person for the petitioners, who, on the hearing of the petition, appeared to have no title. *St. John v. Stirling*, 23

7. When there is a doubt on the identity of a legatee, the court will direct an inquiry at the expense of the person requiring it. *Denyer v. Druce*, 32

8. A bill having been filed by the plaintiff on behalf of himself and others of the crew of a South Sea whaler, for their shares of the profits, and no case for equitable relief having been made as to the others of the crew, the bill as to them was dismissed. *Spittal v. Smith*, 45

9. Two ladies borrow 10,000*l.* of Coutts & Co., on the bond of themselves and G. N.; they give a bond for 12,000*l.* of the same date, to G. N. A question having arisen whether the bond was for indemnity, or a gift for services, or otherwise, the court directed issues to be tried before a jury. *Earl of Winchelsea v. Garrelly*, 63

10. The court will, on the petition of an assignee of a reversion, order the Accountant-General not to transfer stock, although the petition has not been served, on the assignor. *Salmon v.*, 74

11. The Master of the Rolls has no authority to reverse the Vice-Chancellor's order to supersede a commission of bankrupt, or to rehear the order. *Burton v. Wall*, 118

12. The plaintiff is entitled, under a prayer for general relief, to such remedy as the statement of his case entitles him to. *Topham v. Constantine*, 185

13. Accounts having been settled and a release executed, in order to avoid the latter, and obtain an account in this court, the plaintiff must establish either fraud or surprise. *Davis v. Spurling*, 199

14. In order to induce the court to give a decree to surcharge and falsify, some one mistake must be shown. *Ibid.*

15. If an error be detected, and settled before the institution of a suit, it is not a foundation for a decree to surcharge and falsify. *Ibid.*

16. Bill seeking relief on the ground of fraud or surprise, plaintiff failing to establish either, dismissed with costs. *Ibid.*

17. In case parties choose to satisfy themselves with a personal obligation, the court, on a bill for specific performance, will not give more. *Brough v. Oddy*, 221

18. It is not the practice for executors to apply to pay money into court. *Lord Dorchester v. The Earl of Effingham*, 281

19. A supplemental bill cannot be filed

to an original bill, in respect of which subpoenas have not been served. *Stewart v. Nichols*, 307

20. Where a purchaser under the court has made a profit, the court will not make absolute the order nisi for confirming the purchase, unless the profit be brought into court. 348

21. The court will not, at the hearing, dismiss a subsequent incumbrancer, although he undertook to join in any conveyance he might be called upon to execute. He ought to have disclaimed on his answer, and not having done so he must remain a party. *McNab v. Meneal*, 375

22. The master, to whom exceptions to answer were referred, made his report, certifying the answer to be insufficient, and allowed the defendant one month's further time to put in his answer; the plaintiff, three weeks afterwards, amended his bill, and obtained an order that the defendant should answer the amendments at the same time that he answered the exceptions. The defendant obtained an order, *ex parte*, for six weeks' time to answer both. On the petition of the plaintiff to discharge the last-mentioned order, the petition was dismissed, and it was held, that the eighth of Lord Lyndhurst's orders applies only to the answer to exceptions. *Fobrooke v. Balguy*, 453

23. It has been decided several times, that a case may be within the words of a statute, and yet not within the spirit of it; and the court will decide according to the spirit of the statute. 460

24. An administrator having claimed his debt before the master, that is sufficient to entitle him to retain it. 475

25. Executors having filed a bill in a case of fraud, and the court being of opinion that they had duly filed their bill, although they had not properly stated their prayer, yet under the prayer for general relief they were held to be entitled to such relief as the case made by the bill required. 487

See ACCOUNTS.

COSTS.

COUNSEL.

EXECUTORS.

FEME COVERT.

INSOLVENT.

LEGACY.

SPECIFIC PERFORMANCE.

TRUSTEES.

VENDOR AND PURCHASER.

PROPOSAL.

See AGREEMENT.

R.

REAL ESTATE.

See ASSETS.

RECOMMENDATION.

See WILL; 8.

RECOVERY.

See HUSBAND AND WIFE.

RENEWAL.

See FINES FOR RENEWAL.

RESIDUE.

The court will construe a residuary gift more favorably than a general legacy, to make it vest in order to avoid an intestacy. 367

REVERSIONS.

1. A person having a reversionary interest expectant upon the death of R. without issue, sells the same. Many years afterwards a bill was filed to set aside the sale, on the ground of inadequacy of consideration: Held, that the court will not enter into the value of property on such a contingency. But it appearing that the treaty was entered into on the basis of considering the contingency to be half the value of the reversion, the court directed an inquiry of the real value, without reference to the contingency, and directed that that contingency should be rated at one-half the value. *Baker v. Bent*, 368

2. It is incumbent on the purchaser of a reversion to prove the value. 374

3. A bill was filed in 1876 to make void a sale of a reversion effected in 1806. It was proved that the price was inadequate. It was held, that in a suit

to make void the sale of a reversion, it was not necessary to prove fraud or surprise; inadequacy of consideration being alone sufficient, by the decided cases, to authorize the court to make void the sale and treat the purchaser of a reversion only as a mortgagee; that is, that the vendor, paying the purchaser his principal, interest and costs, is entitled to a reconveyance. *Hilliard v. Gambel*, 375

See PRACTICE, 10.

S

SCOTLAND.

See CHARITIES.
HERITABLE BOND.

SEIGNORY.

See CUSTOMARY ESTATES.
EXTINGUISHMENT.

SHIPPING.

See ACCOUNTS.

SPECIFIC REQUEST.

See ASSETS.

SPECIFIC PERFORMANCE.

1. A husband being prosecuted and found guilty, at the Quarter Sessions, of an assault upon his wife, the court recommended an accommodation of the disputes and differences between them. The counsel of the parties signed a memorandum of an agreement, that the husband should allow the wife an annuity of 50*l*, and the court, advertng to the arrangement, passed sentence upon the defendant, imposing only a nominal fine upon him. It was proved that the defendant's attorney stated publicly in court, that the defendant had come into the agreement, and that the defendant was in court when the arrangement was entered into. The defendant, by his answer, denied that he ever consented to it; and on his part there were depositions that to some extent supported it: Held, that it was not incumbent on the plaintiffs to prove that the defendant did assent to an agreement entered into by counsel, but on the defendant to disprove it: Held, also, that

the weight of the evidence being that the defendant did not dissent, a court will conclude a counsel had authority: Held, that the plaintiffs were entitled to a decree for a specific performance, with costs. *Elworthy v. Bird*, 38

2. A. agrees to lend B. 3,000*l* on mortgage of leasehold houses, and not to call for the title of the lessor, and advanced 600*l* in part. He then called for the lessor's title, and filed a bill for specific performance, or sale of the property to repay him the 600*l* and interest: Held, that he was not entitled to the title, but only to a specific performance of the contract, as proved; and that if a plaintiff insists upon what he is not entitled to, whilst the defendant has been ready to perform the agreement really entered into, the defendant is entitled to costs. *Bass v. Cliveley*, 80

3. The plaintiff having parted with title deeds, on which she had a lien, to enable her debtor to raise a sum of money on annuity, the defendant, by memorandum in writing, undertook to pay that annuity to the plaintiff, in case it should not be paid by the grantor. The annuity fell into arrear, and the plaintiff paid it. On a bill for specific performance and adequate security: Held, that the plaintiff having taken this personal security, a court of equity would not interfere. Bill dismissed. *Brough v. Oddy*, 215

4. Children entered into an agreement for the distribution of their father's property on his death, and which was to be taken to him for his approbation. He died before the agreement was submitted to him. The court refused to carry it into effect. *Beastall v. Swain*, 288

See PARTIES.
PRACTICE.
WILL, 8.

STAMPS.

Letters of administration, under which a plaintiff makes title, must be stamped *ad valorem*, but the court will allow a cause to stand over a week for that purpose. *Harper v. Ravenhill*, 144

STATUTE OF LIMITATIONS.

See INSOLVENT.
MORTGAGE.

SURETIES.

See CONFIRMATION.

T

TENANT IN TAIL.

See HUSBAND AND WIFE, 3.
LES PENDENS.

TIMBER.

See POWER.

TITHES.

Wood cut from hedges is tithable, although not used on the farm. *White v. Smith*, 306

TRUSTEES.

1. A. contracted to sell a freehold estate to B., and by his will gave the purchase money and the interest to become due in the meantime to trustees, for certain purposes; and if the contract should not be completed, he devised the freehold estates to the trustees upon trust, to sell the same, and apply the purchase money to the like purposes. A. died, leaving a son, his heir at law, who died, leaving an only daughter, his heiress at law, an infant. The court held, that she was not a trustee within the act 6 G. IV, c. 74, and dismissed a petition that the infant might be ordered to convey. *In re Moody*, 4

2. The heir at law of a person entitled to the reversion of a copyhold having covenanted to surrender it, and died without having been admitted, leaving an infant his customary heir: Held, that the infant was not within the statute. 10, n.

3. Where a sole trustee in a will, to whom a term of 2,000 years was devised, dies in the testator's lifetime, the court will refer it to the master to appoint a new trustee, and to settle and approve of a demise for the like term. *Devey v. Peace*, 77

4. Only one trustee having been appointed by the will, the master can only name one instead of him. 78

5. Trustees not affected by notice to their agent, which he did not receive in

that character. Trustees, having contracted to purchase land, sell out stock, and deposit the produce at a banker's, when the purchase seems to be near completion; they are not liable to make good the money if the bankers fail. *France v. Woods*, 172

6. The Master of the Rolls, in a suit by the assignees of a bankrupt, against the trustee of a fund contingent on the event of the bankrupt surviving his mother, which event happened after the bankruptcy, having made a decree in favor of the plaintiffs, would not make the trustee pay costs, he having acted in ignorance. *Knight v. Martin*, 237

7. In a suit for the appointment of new trustees, there being no power in the deed for that purpose, the court refused to direct such a power to be inserted in the new deed. *Southwell v. Ward*, 314

8. The testator having directed his two trustees to apply a moiety of rents, or such part as they or he should in their or his discretion see fit in the maintenance and education or advancement in life of his younger children during the life of his wife, and one of the trustees having died, the court would not interfere with the discretion to be exercised by the surviving trustee. *Livesey v. Harding*, 460

9. Trustees of stock signed a power of attorney to sell it out, and the proceeds were received from the broker by one of the trustees, who afterwards became insolvent: Decreed, that the other trustees account for and pay the amount. *Marriott v. Kinnersly*, 470

10. A trustee is liable if he incautiously does an act by which he places the trust property in the hands of persons who abuse it. *Ibid.*

11. A trustee is not chargeable for acts done before he accepts or acts in the trusts. *Ibid.*

12. If there be a communication between a trustee and a person for whose benefit a trust is created, then the trustee is liable to him; but he is only not so when there is not that communication. 474, 475

See ATTORNEY AND CLIENT.
EXECUTORS.
FEME COVERT.

TRUSTS.

See HEIR AT LAW.

U

USURY.

Annuity for years originating in an agreement for a loan, and producing more than a return of the principal, and five per cent. interest, is usurious. *Fordey v. Wightwick*, 260

V

VENDOR AND PURCHASER.

1. A vendor who has taken, as a security for part of the purchase money, the bond of the vendee and a mortgage of part of the property sold, cannot, on the bankruptcy of the vendee, establish a lien on the entire estate. *Copper v. Spottiswoode*, 21

2. A. having deposited leases with B., to secure moneys borrowed at different times from 1805 to 1813, in the latter year signed an agreement, giving up all his interest to the mortgagee; it was proved that the sum due to the mortgagee was a very inadequate consideration: Held, that A. was not entitled to relief in equity, and bill dismissed. *Purdie v. Mitchell*, 28

3. Where an estate has been sold to a person who has since died, the court will direct an account to be taken of the personal estate, and decree that the vendor shall have a lien on the land for so much as the personal estate will not extend to pay. *Topham v. Constantine*, 135

4. A purchaser in this court having resold with a prout before his purchase was confirmed, the person to whom he has sold is to be considered as a substituted purchaser under the court, and must pay the additional purchase money into court, for the benefit of the parties to the suit. *Hodder v. Staffin*, 341

5. An estate having been sold, in which the petitioners were interested, it was represented to them that a good title could not be made; and they were induced to give a brief to counsel, to consent to the purchaser being discharged; they subsequently discovered circumstances which led them to conclude they had

been deceived, and that, in fact, a good title could be made, and thereupon petitioned the court that the order might be discharged. The court discharged the order, giving the purchaser his costs, and referred it to the master to inquire whether a good title could be made. The solicitor for the petitioner to have the conduct of the inquiry. *Butler v. Ommaney*, 344

6. A purchaser having given notice that he would not complete the purchase, and the vendors having delayed to file their bill for specific performance more than twelve months after that notice, the court held that it was an unwarrantable delay, and dismissed the bill with costs. *Watson v. Reed*, 381

7. The plaintiff made a mortgage to the first husband of the defendant, who, after that husband's death, lent the plaintiff the sum of 200*l.*; subsequently she bought the estate for an additional 400*l.* Soon afterwards she granted a lease to the plaintiff, and signed an agreement indorsed on the lease, that the plaintiff might repurchase within five years, paying the rent as it became due. The rent was not regularly paid, in some instances, not until distresses were levied: Held, that this was not a case of forfeiture, but of particular indulgence; from all the evidence, the court was of opinion, that the transactions were not contemporaneous, and the court held, that the terms not having been fulfilled, the bill must be dismissed, and with costs. *Davis v. Thomas*, 416

8. A purchaser entitled to title deeds having paid his purchase money into court, the court will not order the money to be divided, and the deeds to remain in the hands of the master until the completion of the purchase of all the other lots. *Houson v. Nouse*, 446

9. Houses and lands were devised to trustees in fee upon trust for sale; the surviving trustee appointed the plaintiffs his executors, but did not make any devise which comprehended trust estates. On the death of the surviving trustee, his executors sold the property in lots. The defendant became the purchaser of four of them, and just as his purchase was about to be completed, it was discovered that the legal estate was in an infant, the heir at law of the surviving trustee. The plaintiffs thereupon presented a petition to the court, under the statute 6 G. IV. that the infant might be directed to convey. The plaintiffs' solicitor apprised the

defendant's solicitors of this proceeding, to which they made no objection. Twelve months elapsed before the master's report could be obtained, and a short time previously the defendant commenced an action for the deposit, and subsequently recovered it; in the meantime the dilapidations of the houses purchased had increased: Held, that although the defendant might have retired from the contract on the discovery of the defect in the vendor's title, yet as he did not do so, and acquiesced in the proceedings which were necessary to clothe the plaintiffs with the legal title, and there being no evidence that reasonable diligence was not used in the master's office, the plaintiffs were entitled to a decree for specific performance: Held, that the defendant was entitled to the amount of the dilapidations: Held, that the defendant was entitled to costs: Held, that the plaintiffs were only entitled to interest from the date of the decree, but that the vendors were entitled to the rents up to that date. *Hoggart and others v. Scott*, 501

10. The defendant contracted to sell an inn to the plaintiff, and in the treaty represented to him that the agreement under which the tenant in possession held it was a void agreement, and that he would give the plaintiff possession at Michaelmas following. He had in fact given the tenant notice to quit at that time; the tenant did not quit. These representations were proved by witnesses: Held, that the plaintiff was entitled to be released from the agreement, or that he might at his election perform it and have compensation. He elected to have performance, and it was decreed to him, with compensation and costs. *Besant v. Richards*, 509

See ATTORNEY AND CLIENT.
BANKRUPTCY, 2.
LIS PENDENS.
PARTIES, 3.
POWER, 1.
PRACTICE, 10, 20.
REVERSIONS.

W

WAIVER.

See ANNUITY.

WIDOW OF A FREEMAN OF LONDON.

A bequest to the widow of the testator

in lieu of dower, does not preclude her from her claim on the personal estate as the widow of a freeman of London. *Harrison v. Harrison*, 276

WILL.

A., by each of two several codicils to his will, directed his just debts to be paid, and in particular, a debt of 12*l.*; by the one of them, he gave 100*l.* to a charity, and by the other, he gave 200*l.* to the same charity: Held, that the legacies were not accumulative, and that the latter legacy was only a substitution of the former. The gifts in this case were to the Guernsey Hospital; there was not any hospital by that name, and therefore the court would not apply the funds. *Simon v. Barber*, 14

2. A testator gave to his wife an annuity, and 100*l.* a year for each of his three children during their minorities; and from and after the decease or marriage of his wife, then the 300*l.* to be divided amongst his said children, in like manner as his other effects; and subject thereto he bequeathed his leasehold and personalty unto his three children, and the survivors and survivor of them. One of them died under twenty-one: Held, that he took a vested interest at the time of the death of the testator. *Bass v. Russell*, 18

3. A., a married woman, having, by virtue of her marriage settlement, power to appoint her personalty and a freehold to such person as she should direct, with remainder to a trustee to sell, and distribute amongst her next of kin, gave, devised and bequeathed to her husband the freehold, by the description of her two fields and house; likewise the remainder of her personalty, and all she might be possessed of at the time of her death, after certain previous bequests and her just debts were discharged, and appointed him and another executors: Held, that the husband took only an estate for life, and the next of kin were entitled to the moneys to arise by a sale of the reversion. *Monk v. Mawdsley*, 24

4. A testator, in the early part of his will, gave all his property amongst his four illegitimate children, a boy and three girls, subject to such regulations and legacies as he should thereafter mention. He then says: "As the whole of this estate is to be equally divided amongst the before mentioned four children, or the survivor of them, a regular division must

be made of the estate when each comes of age or is married; and the share of such person is not to be considered any longer as belonging to the public stock, but to the particular person so coming of age, if a boy; when the girls, or any one of them, come of age or get married, I hereby direct that their shares may be so settled on themselves during their lives, and on their children, in equal proportions after their deaths; that it will not be in the power of the husband, if so inclined, to injure either his wife or children." The testator then proceeds: "Should it be the will of Almighty God to take one or more of these children unto himself, the share or shares of such children dying without issue are to be divided amongst the survivors; but, in case of issue, these children are to inherit the share of their parents amongst them equally; and, in case they die without issue, it is to return for the benefit of the survivors of those four children, or their families. Upon the reversion of any sum to the public stock, the issue of a deceased child is to have the share which its parent would have had:" Held, that the boy, on attaining twenty-one, took an absolute interest in his share: Held, that the daughters took for life, with remainder to their issue: Held, that on either daughter dying without issue, her share would go to the survivors of the four children, in like manner as their original shares. *Jackson v. Forbes*, 88

5. J. L., by his will, devised his manors to trustees, upon trust, to convey the same to his son, J. H. L., for life; with remainder to trustees, to preserve contingent remainders; with remainder to the second and other younger sons of J. H. L., in tail male. There was no limitation to the first son of J. H. L., but the declaration of the trusts of the term contained a provision to raise money for the daughters on failure of issue male of the body of J. H. L. The will also provided, that in case J. H. L. should have any children other than and besides an eldest or only son, then money might be raised by him for the portion of younger sons or daughters: Held, that the true construction of the will was, that the first son should have an estate tail male in reversion after the death of his father. *Langston v. Pole*, 119

6. R. N., by his will, gave all his personal estate to R. F. and I. F., that is to say, (he then enumerates several particulars,) in trust for the following purposes: that the same be not liable, or resorted to

for the payment of mortgages or bond debts until the legacies, debts and charges thereinafter mentioned should be satisfied, and as soon as that could be effected, the same was to be resorted to in relief of his real estate. The testator then gave several legacies to his wife and children, and bequeathed the residue, after the respective charges thereby made thereon, to his eldest son: Held, that the residue, as well as the enumerated articles, were subject to the charges in the will mentioned. *Nicholas v. Nicholas*, 269

7. Bequest of a sum of 50*l.* to each of the three children of A. Now A. had five children: Held, that each child was entitled to 50*l.* *Harrison v. Harrison*, 273

8. An old gentleman, who had several children and grandchildren, had made and executed two wills, and disputes having arisen in the family about them, some of the oldest members of it entered into an agreement amongst themselves for a division of his real and personal estate. This was to be taken the next day, to the testator, for his approbation, and he was to be desired to cancel both wills. In the course of the night the testator died. The personal property was divided according to the agreement, and a deed of covenant was executed with respect to the appropriation of the real estate; which deed, the party whose rights under the last will would be much diminished by it, understood to be a deed for carrying the first agreement into execution; but, in fact, the two instruments differed in many particulars: Held, that the first agreement was only a recommendation to the testator, and could not be carried into effect in equity: Held, that the second agreement or deed differing from the first agreement, whilst it was understood to contain corresponding provisions, could not be carried into effect. No costs given, the defendant having secluded the testator from the other members of the family. *Beastall v. Swain*, 288

9. A testator having directed his executors to pay the interest of the residue to a woman during her life, and after her decease to divide the residue amongst the next of kin. Held, the next of kin at the testator's death were the persons entitled. *Collisam v. Sams*, 346

10. A testatrix directs that the interest of 6,000*l.* shall be paid to her son during his life, and at his death, one-half of the stock to go to the son's eldest male child living at the death of the testatrix; the

other 3,000*l.* to be divided in equal shares between his other children lawfully begotten; but should the son of the testatrix die without leaving issue, then she gave the 6,000*l.* over to her two other children during their lives, and at their deaths to their issue; and if either of them should die without leaving issue, then to the grandchildren which should remain. By a codicil the testatrix willed, that upon the death of each one of her children who had issue, that her grandchildren's share be settled upon them, to enjoy the interest during their lives, and afterwards to revert to their children: Held, that in respect to the gift to the eldest male child of the son "living at my death," the limitation over by the codicil of the 3,000*l.* given to him by the will, is within the rules of law: Held, that the gift of the 3,000*l.* to the other children of the testatrix's son, being general, extended to all the children he might have, either before or after her death; and that the limitation over by the codicil to their children, was therefore void. *Arnold v. Congreve*, 347

11. An estate cannot be limited after an estate to unborn children. 358

12. Where a limitation is to grandchildren generally, it extends not only to those *in esse* at the death of the testatrix, but those born afterwards, and therefore any limitation to their children is not within the rules of law. 359

13. Where a codicil fails by reason of its giving an interest too remote, the will is not affected by the codicil, and the interest of the legatees rest upon the construction of the will only. 359

14. And where grandchildren by a will take an absolute interest, and a codicil made for the purpose of letting in great-grandchildren having failed, the interest given to the grandchildren by the will will not be displaced by the codicil. *Ibid.*

15. A testatrix, by her will, directed that the interest of the residue of her estate should be divided between her four sisters during their natural lives, and on their deaths the interest to be applied in the maintenance or education, or accumulate for the benefit, of the children of each of the sisters so dying, until they should severally attain the age of twenty-two, and upon their attaining that age they were to become entitled to their mother's share of the principal; and in case of the death of either of them under that age,

leaving issue, such issue to be entitled to their respective parents' share, at such time as the parents would have been entitled thereto if living: Held, that the gift to the children of the sisters was too remote, and they being void, the subsequent gifts were also void, and the shares as they drop in, belonged to the next of kin. *Vaudrey v. Geddes*, 361

18. It has been held, that the court will construe a residuary gift more favorably than a general legacy, to make it vest in order to prevent an intestacy. 367

17. A legacy cannot be held to be vested where it is given over, if the legatee do not attain a certain age, although maintenance be given; the gift over repels all presumption of vesting. *Ibid.*

18. As to freehold, a different rule prevails. *Ibid.*

19. A., by his will in October, 1822, gave 12,500*l.* and 10,000*l.* 4*l.* per cent. bank annuities. There were at that time two stocks at 4*l.* per cent., and the testator had moneys in each. One of those stocks was, prior to his death, reduced to 3*l.* 10*s.* per cent.: Held, that the legatees were entitled to have the respective amounts in the other 4*l.* per cent. annuities still existing. *Banks v. Sladen*, 407

20. A testator having given by his will legacies to his several daughters, directed that 1,000*l.* of the legacy to each of them should be invested in the name of trustees, and the daughter entitled, in trust to pay her the interest, for which her receipt should be sufficient, and it should not be subject to the debts of her husband, and the principal should, after her death, pass and be subject to any will or disposition she might, under her hand and seal, make thereof, and for want thereof should go to her personal representatives. The plaintiff married, in succession, two of the daughters: Held, that the words "personal representatives" mean executors and administrators; that the wife took an absolute interest, and that the husband, on her death, became absolutely entitled. The marriage with the second sister having been solemnized in Scotland, an inquiry was directed whether it had actually taken place. *Saberton v. Skeels*, 383

21. Gift to a wife; and if she make no disposition of it, then over: Held, an absolute gift. *Bourn v. Gibbs*, 414

be made of the estate when each comes of age or is married; and the share of such person is not to be considered any longer as belonging to the public stock, but to the particular person so coming of age, if a boy; when the girls, or any one of them, come of age or get married, I hereby direct that their shares may be so settled on themselves during their lives, and on their children, in equal proportions after their deaths; that it will not be in the power of the husband, if so inclined, to injure either his wife or children." The testator then proceeds: "Should it be the will of Almighty God to take one or more of these children unto himself, the share or shares of such children dying without issue are to be divided amongst the survivors; but, in case of issue, these children are to inherit the share of their parents amongst them equally; and, in case they die without issue, it is to return for the benefit of the survivors of those four children, or their families. Upon the reversion of any sum to the public stock, the issue of a deceased child is to have the share which its parent would have had." Held, that the boy, on attaining twenty-one, took an absolute interest in his share: Held, that the daughters took for life, with remainder to their issue: Held, that on either daughter dying without issue, her share would go to the survivors of the four children, in like manner as their original shares. *Jackson v. Forbes*, 88

5. J. L., by his will, devised his manors to trustees, upon trust, to convey the same to his son, J. H. L., for life; with remainder to trustees, to preserve contingent remainders; with remainder to the second and other younger sons of J. H. L., in tail male. There was no limitation to the first son of J. H. L., but the declaration of the trusts of the term contained a provision to raise money for the daughters on failure of issue male of the body of J. H. L. The will also provided, that in case J. H. L. should have any children other than and besides an eldest or only son, then money might be raised by him for the portion of younger sons or daughters: Held, that the true construction of the will was, that the first son should have an estate tail male in reversion after the death of his father. *Langston v. Pole*, 119

6. R. N., by his will, gave all his personal estate to R. F. and I. F., that is to say, (he then enumerates several particulars,) in trust for the following purposes: that the same be not liable, or resorted to

for the payment of mortgages or bond debts until the legacies, debts and charges thereafter mentioned should be satisfied, and as soon as that could be effected, the same was to be resorted to in relief of his real estate. The testator then gave several legacies to his wife and children, and bequeathed the residue, after the respective charges thereby made thereon, to his eldest son: Held, that the residue, as well as the enumerated articles, were subject to the charges in the will mentioned. *Nicholas v. Nicholas*, 269

7. Bequest of a sum of 50*l*. to each of the three children of A. Now A. had five children: Held, that each child was entitled to 50*l*. *Harrison v. Harrison*, 273

8. An old gentleman, who had several children and grandchildren, had made and executed two wills, and disputes having arisen in the family about them, some of the oldest members of it entered into an agreement amongst themselves for a division of his real and personal estate. This was to be taken the next day, to the testator, for his approbation, and he was to be desired to cancel both wills. In the course of the night the testator died. The personal property was divided according to the agreement, and a deed of covenant was executed with respect to the appropriation of the real estate; which deed, the party whose rights under the last will would be much diminished by it, understood to be a deed for carrying the first agreement into execution; but, in fact, the two instruments differed in many particulars: Held, that the first agreement was only a recommendation to the testator, and could not be carried into effect in equity: Held, that the second agreement or deed differing from the first agreement, whilst it was understood to contain corresponding provisions, could not be carried into effect. No costs given, the defendant having secluded the testator from the other members of the family. *Beastall v. Swain*, 288

9. A testator having directed his executors to pay the interest of the residue to a woman during her life, and after her decease to divide the residue amongst the next of kin. Held, the next of kin at the testator's death were the persons entitled. *Collisam v. Sams*, 346

10. A testatrix directs that the interest of 6,000*l*. shall be paid to her son during his life, and at his death, one-half of the stock to go to the son's eldest male child living at the death of the testatrix; the

other 3,000*l.* to be divided in equal shares between his other children lawfully begotten; but should the son of the testatrix die without leaving issue, then she gave the 6,000*l.* over to her two other children during their lives, and at their deaths to their issue; and if either of them should die without leaving issue, then to the grandchildren which should remain. By a codicil the testatrix willed, that upon the death of each one of her children who had issue, that her grandchildren's share be settled upon them, to enjoy the interest during their lives, and afterwards to revert to their children: Held, that in respect to the gift to the eldest male child of the son "living at my death," the limitation over by the codicil of the 3,000*l.* given to him by the will, is within the rules of law: Held, that the gift of the 3,000*l.* to the other children of the testatrix's son, being general, extended to all the children he might have, either before or after her death; and that the limitation over by the codicil to their children, was therefore void. *Arnold v. Congreve*, 347

11. An estate cannot be limited after an estate to unborn children. 358

12. Where a limitation is to grandchildren generally, it extends not only to those *in esse* at the death of the testatrix, but those born afterwards, and therefore any limitation to their children is not within the rules of law. 359

13. Where a codicil fails by reason of its giving an interest too remote, the will is not affected by the codicil, and the interest of the legatees rest upon the construction of the will only. 359

14. And where grandchildren by a will take an absolute interest, and a codicil made for the purpose of letting in great-grandchildren having failed, the interest given to the grandchildren by the will will not be displaced by the codicil. *Ibid.*

15. A testatrix, by her will, directed that the interest of the residue of her estate should be divided between her four sisters during their natural lives, and on their deaths the interest to be applied in the maintenance or education, or accumulate for the benefit, of the children of each of the sisters so dying, until they should severally attain the age of twenty-two, and upon their attaining that age they were to become entitled to their mother's share of the principal; and in case of the death of either of them under that age,

leaving issue, such issue to be entitled to their respective parents' share, at such time as the parents would have been entitled thereto if living: Held, that the gift to the children of the sisters was too remote, and they being void, the subsequent gifts were also void, and the shares as they drop in, belonged to the next of kin. *Vaudrey v. Geddes*, 361

18. It has been held, that the court will construe a residuary gift more favorably than a general legacy, to make it vest in order to prevent an intestacy. 367

17. A legacy cannot be held to be vested where it is given over, if the legatee do not attain a certain age, although maintenance be given; the gift over repels all presumption of vesting. *Ibid.*

18. As to freehold, a different rule prevails. *Ibid.*

19. A., by his will in October, 1822, gave 12,500*l.* and 10,000*l.* 4*l.* per cent. bank annuities. There were at that time two stocks at 4*l.* per cent., and the testator had moneys in each. One of those stocks was, prior to his death, reduced to 3*l.* 10*s.* per cent.: Held, that the legatees were entitled to have the respective amounts in the other 4*l.* per cent. annuities still existing. *Banks v. Staden*, 407

20. A testator having given by his will legacies to his several daughters, directed that 1,000*l.* of the legacy to each of them should be invested in the name of trustees, and the daughter entitled, in trust to pay her the interest, for which her receipt should be sufficient, and it should not be subject to the debts of her husband, and the principal should, after her death, pass and be subject to any will or disposition she might, under her hand and seal, make thereof, and for want thereof should go to her personal representatives. The plaintiff married, in succession, two of the daughters: Held, that the words "personal representatives" mean executors and administrators; that the wife took an absolute interest, and that the husband, on her death, became absolutely entitled. The marriage with the second sister having been solemnized in Scotland, an inquiry was directed whether it had actually taken place. *Saberton v. Skeels*, 383

21. Gift to a wife; and if she make no disposition of it, then over: Held, an absolute gift. *Bourn v. Gibbs*, 414

22. Bequest of 10,000*l.* provided the legatee attain twenty-one. In a subsequent part of the will, the testator appointed guardians, whom he requested to attend particularly to the education and well being of the legatee, and see that she was properly and virtuously brought up and educated: Held, that the interest of the legacy was applicable to the maintenance of the legatee, but the principal was contingent. *Mills v. Roberts*, 476

23. A legatee being a natural child, the testator has no power to appoint guardians for her, but the persons named in the will being well known to the court as proper persons, they were appointed guardians, without a reference to the master. *Ibid.*

24. Bequest of residue upon trust, to pay the dividends to three persons during their lives and the life of the survivor of them; and after their deaths to transfer the principal to A. and B., and if either of them died before his share of the trust money became payable, without leaving issue of his body lawfully begotten, then his share should go to the survivor when his original share would become payable. A. died in the lifetime of the testator. B. survived the testator and the persons to whom life interests were given: Held, that B. was entitled to one moiety as his original share, and to the other moiety as having survived A., who died without leaving issue of his body. *Humphreys v. Howes and others*, 497

25. Bequest of residue to trustees upon trust for testatrix's brother's children and M.'s children, to be equally divided between them; the dividends to be laid out by the trustees as should be most advantageous for them; but no part of the dividends to go for their board or education, but the same to accumulate for them until they come to the age of twenty-one years.

M. was herself one of the children of the testatrix's brother: Held, that the children born at the death of the testatrix took vested interests: Held, that the testatrix did not mean to include M. as one of the children of her brother. *Bull v. Johns*, 513

26. The testator directed his personality to be invested for the sole use and maintenance of his daughter until she arrived at twenty-one; and when she attained twenty-one, the remainder to be paid to the daughter. She died under twenty-one: Held, a vested interest. *Rofe v. Sowerby*, 375

27. An heir at law, in his answer to a bill to establish a will, admitted that the will was well executed and the sanity of the testator. The heir died, and the bill was revived against his brother, who disputed the execution of the will, and the sanity of the testator: Held, that the court would not allow him to do so. *Livesey v. Harding*, 460

28. A devise to daughters and the heirs of their bodies, as tenants in common; and if only one, to such only daughter and the heirs of her body, with remainder, in default of issue, to the testator's right heirs: Held, that there were cross remainders between the daughters. *Ibid.*

See ADEPTION.

ANNUITY.

CHARITIES.

CHILDREN.

CONDITION.

COPYHOLDS.

CROSS REMAINDERS.

EXECUTORY INTERESTS.

HEIR AT LAW, 7.

HUSBAND AND WIFE, 1.

INSOLVENT DEBTORS, 3.

POWER, 1, 2.

PRACTICE, 1, 7.



